Petition

81-1612
No. .....

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

BROTHERHOOD OF RAILROAD SIGNALMEN,
PACIFIC SOUTHWEST GENERAL COMMITTEE,
R. T. BATES, G. G. RUHL, J. T. BASS, K. D. RANEY,
O. C. LEWIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in rejecting the holding of other courts of appeal that a railway labor dispute is "minor," and hence arbitrable, as long as the action that forms the basis for the dispute is arguably justified under the collective bargaining agreement or not frivolous.

2. Whether the court erred in finding that proposals for amendment of a collective bargaining agreement and informal efforts to resolve disputes amicably can be construed as admissions that the suggested change is prohibited by the existing agreement.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

Petitioner is a partially owned (over 99%) subsidiary of Southern Pacific Transportation Company. The partially owned subsidiaries and affiliates of the petitioner are:

Alton & Southern Ry. Co.
Arkansas & Memphis Ry. Bridge & Terminal Co.
Dallas Terminal Ry. & Union Depot Co.
St. Louis Southwestern Ry. Co. of Texas
Southern Illinois & Missouri Bridge Co.
Terminal R.R. Association of St. Louis
Glascar Inc.
Main Street Warehouse Company
The Southwestern Town Lot Corp.
Kansas City Terminal Railway Co.
Trailer Train Company

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VS.

BROTHERHOOD OF RAILROAD SIGNALMEN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner St. Louis Southwestern Railway Company ("Cotton Belt") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 1, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 665 F.2d 987 (10th Cir. 1981), and appears in the Appendix at pages 1 through 27. The Memorandum and Order of the District Court for the District of Kansas, which has not been reported, appears in the Appendix at pages 28 through 61. The judgment of the Court of Appeals appears in the Appendix at page 62.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Tenth Circuit reversing the district court's grant of preliminary injunctive relief was entered on December 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

APPLICABLE STATUTORY PROVISIONS

Sections 2, 3 First(i), and 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, are set forth in the Appendix beginning at page 68.

STATEMENT OF THE CASE

During 1981, petitioner Cotton Belt undertook to rebuild the rail lines and yards it had acquired from the bankrupt Chicago, Rock Island & Pacific Railroad Company ("Rock Island") on October 30, 1980.[1] The first line to be rebuilt, including new roadbed, tracks, ties, communications and signal systems, was the nearly 700 mile line between Tucumcari, New Mexico, and Topeka, Kansas (the "Tucumcari line"). The financing agreement with the Federal Railroad Administration required that the $97 million project be completed by December 31, 1981 (Finding No. 16, App. at 34).[2]

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[1]Although Cotton Belt had agreed to purchase the Rock Island lines in 1978, the Interstate Commerce Commission ("ICC") did not approve the purchase until June 6, 1980. The deteriorated state of the acquired trackage of the Rock Island, the Cotton Belt's commitment to rehabilitate the properties, and the public interest served by the acquisition and rehabilitation were described by the ICC in *St. Louis Southwestern Railway Company—Purchase (Portion)—William M. Gibbons, Trustee of the Property of the Chicago, Rock Island & Pacific Railroad Company, Debtor*, 363 I.C.C. 320.

[2]References to the district court's findings will be in the form "Finding No. . . ., App. at . . ," while references to the unnumbered

This project created new work opportunities for electricians, signalmen and other craftsmen. Because all of its signalmen were already fully engaged in other work on its other lines, Cotton Belt extensively recruited and hired as many signalmen as possible for the 1981 temporary construction projects (Finding No. 29, App. at 40-41). Despite those efforts, by the spring of 1981, Cotton Belt did not have enough signalmen to complete all of the projects scheduled for that year in a timely fashion (Finding No. 30, App. at 41).[3]

Because of its inability to hire sufficient signalmen and the need to complete the work, Cotton Belt hired Serrmi Corporation to perform a small part of the work involved in construction of a new Centralized Traffic Control ("CTC") system between Topeka and Herington, Kansas (Finding No. 35, App. at 43).[4] No Cotton Belt employees were laid off, and none was adversely affected by the employment of Serrmi (Finding No. 43, App. at 45). Indeed, even after hiring Serrmi, Cotton Belt still needed, and tried to hire, additional signalmen (*id.*). Nonetheless, when it learned of the contract with Serrmi, respondent Brother-

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conclusions of law will be in the form "App. at . . ." References to the decision of the court of appeals will be in the form "App. at . . ."

[3]By late spring of 1981, Cotton Belt was able to hire 21 signalmen and 48 assistant signalmen. Since its minimum requirements were 84, it was short 15 signalmen (*id.*).

[4]The limited nature of the work to be performed by Serrmi is apparent from the fact that it was to be paid only $336,960 while the entire CTC project was to cost $7,227,385. (Finding No. 36, App. at 43.)

hood of Railroad Signalmen ("BRS" or "Union") objected and threatened to strike, claiming that the contract violated the collective bargaining agreement.

Cotton Belt brought suit in the District Court for the District of Kansas seeking to prevent BRS from engaging in a strike. The legal issue presented to the court was whether the dispute over Cotton Belt's use of an outside contractor is a "major" or "minor" one under the Railway Labor Act. Under the Act, different procedures are prescribed for the resolution of major and minor disputes, and there is no right to strike over minor disputes.

The applicable collective bargaining agreement is silent on whether work can be contracted out by the employer. Cotton Belt relied in part on past practices under the agreement, pointing out that during World War II it had regularly used outside contractors, without objection from the Union, to install CTC systems and perform other signal work, and that the only reason it had not again exercised that right before this dispute was that it had been able to satisfy its needs for signal work by use of its own employees. Based on this history, and the absence of any express prohibition in the agreement, Cotton Belt argued that it has the right to use outside contractors under the circumstances of this case. As a result, Cotton Belt contended, the dispute is "minor" and the Union is barred from engaging in a strike. The Union, pointing out that no outside contracting had been done for many years, contended that the contract with Serrmi constituted a unilateral change in the working conditions of its signalmen and, accordingly, that the dispute was a "major" one under the Act.

On July 23, 1981, the district court enjoined the threatened strike and denied the Union's request for an injunction against outside contracting. The district court determined that the dispute over contracting was a minor dispute, subject to compulsory arbitration under the Railway Labor Act, since the contracting was "arguably allowed by the existing collective bargaining agreement and the established practices of the parties" (App. at 50-51). In so finding, the court stated that it did not believe that it was required to decide the merits of the dispute and that its only duty was to determine the threshold issue of whether the dispute was major or minor (App. at 50-52).

On December 1, 1981, the Court of Appeals for the Tenth Circuit reversed and remanded. The court agreed that "the trial court's findings of fact are accurate and are not disputed" (App. at 7), but disagreed with the conclusions to be drawn from the facts. The court of appeals addressed the merits of the dispute directly and, after reviewing the agreement and past practices, concluded that outside contracting was prohibited.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS ERRED IN REJECTING THE HOLDING OF OTHER COURTS OF APPEAL THAT A DISPUTE IS MINOR (AND HENCE ARBITRABLE) AS LONG AS THE ACTION THAT CAUSED THE DISPUTE IS ARGUABLY JUSTIFIED UNDER THE AGREEMENT OR NOT FRIVOLOUS.

As this Court explained in *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 722-727 (1945), a "major" dispute is one

arising out of efforts to establish a new collective agreement or to change an existing agreement, while a "minor" dispute involves the interpretation or application of an existing collective agreement.

In the case of a major dispute resulting from a proposed unilateral action by a carrier, the union may obtain injunctive relief against the action and, once the statutory procedures are exhausted, the union may strike.[5] *Detroit & Toledo Shore Line R.R. v. Locomotive Firemen & Eng.*, 396 U.S. 142 (1969). If the dispute is minor, however, it is subject to compulsory arbitration before the National Railroad Adjustment Board ("NRAB"),[6] and the union may not strike or obtain injunctive relief against the carrier's proposed action. Further, any threatened strike by the union may be enjoined while the dispute is submitted to the NRAB. *Brotherhood of Railroad Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30, 42 (1957); *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443 (9th Cir. 1968).

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[5]Major disputes go first to mediation (45 U.S.C. § 155, First). If that fails, arbitration of the major dispute is available but it is not compulsory and may be accepted or rejected by either side (*id.*). Finally, presidential intervention may occur and an emergency board may be created (45 U.S.C. § 160). Until 30 days after the emergency board makes its report, the employer may not change working conditions and the union may not strike. Neither party may alter the status quo until the process is exhausted. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969).

[6]*See* 45 U.S.C. § 153, First (i).

In this proceeding, the district court held that its duty was not to determine the merits of the dispute over contracting, but was only to determine the threshold issue of whether the dispute was minor:

> In accordance with the purposes of the Railway Labor Act of resolution of disputes through administrative rather than judicial channels, the court's scope of inquiry is quite narrow. It is not our function to construe or interpret the collective bargaining agreement and determine which of the positions of the parties is correct. Rather, the court simply acts as a "clearinghouse" by determining which administrative body should make the final classification. The court must only decide whether the disputed action by the plaintiff can be "arguably justified" by the existing collective bargaining agreement." [App. at 50.]

As to when a dispute is "minor," the court quoted from the decision of the Court of Appeals for the Ninth Circuit in *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (1968):

> . . . where the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement, as illuminated by long-standing practices, the question of whether the position is well-taken involves a minor dispute. (App. at 50)

The court also cited decisions of the First, Fifth, Eighth and D.C. Circuits to the same effect. Summarizing, the court held that "a dispute is minor as long as a party's position is 'tenable,' 'not frivolous,' or 'arguably justified by the contract'" (App. at 50).

Applying this standard to the facts of the case, the district court found that the dispute was minor:

> As the findings of fact disclose, there has never been a prohibition in any of the collective bargaining agreements agreed to between the Cotton Belt and the BRS from contracting out signal work. The evidence also shows that the carrier has in the past utilized outside contractors when there was an insufficient supply of qualified signalmen available. We believe that under the circumstances of this case that the position of the plaintiff is arguably allowed by the existing collective bargaining agreement and the established practices of the parties. [App. at 50-51.]

Although the district court carefully considered the threshold issue, *i.e.*, the applicable standard, the court of appeals failed even to address this issue. Nor did the court of appeals mention any of the decisions cited by the district court as support for its position. Instead, the court of appeals did exactly what other circuits have said a court should *not* do—it went straight to the merits of the dispute, ignoring admonitions about the limited role of courts in such matters and the congressional policy favoring resolution of such disputes through administrative rather than judicial channels. In so doing, the court implicitly but necessarily rejected the standard articulated by the district court and other courts of appeal (since it did not, and could not, find that the railroad's position was "frivolous" or not "arguably justified") and placed itself in irreconcilable conflict with those courts.

The standard followed in the Ninth Circuit, as described in the *Switchmen's Union* case, is set forth above.[7] The other circuits considering the issue have applied similar tests, requiring a finding that the dispute is minor as long as the railroad's position is "tenable," "not frivolous," "reasonably susceptible" to the contract, "arguably justified" by the contract, or not so "obviously insubstantial" that it is apparent that the purpose of the railroad's unilateral action is to circumvent the procedures of the Railway Labor Act. While the verbal formulations of the proper test vary slightly among the circuits, the intent and effect of all of these formulations is to favor arbitration of disputes unless the carrier's position is totally unfounded in the agreements or practices.[8]

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[7] *See also,* Southern Pacific Transportation Co. v. United Transportation Union, 491 F.2d 830 (9th Cir.), *cert. denied,* 416 U.S. 983 (1974) (reasonabl[y] susceptible); O'Donnell v. Wien Air Alaska, Inc., 551 F.2d 1141 (9th Cir. 1977).

[8] *See, e.g.,* Southern Ry. Co. v. Bhd. of Loc. Fire & Eng'rs., 384 F.2d 323, 327 (D.C. Cir. 1967) (a dispute is minor not major unless the railroad's claimed defense " . . . is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by section 6 for alteration of existing agreements"); International Bhd. of Elec. Wkrs. v. Washington Term. Co., 473 F.2d 1156, 1175 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 906 (reasonably susceptible); Carbone v. Meserve, 645 F.2d 96, 99 (1st Cir. 1981), *cert. denied,* 50 U.S.L.W. 3248 (U.S. Oct. 6, 1981) (No. 81-36) (a dispute must be minor and not major " . . . unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by §6 for alteration of existing agreements."); United Transp. Union v. Penn Central Transp. Co., 505 F.2d 542, 544 (3d Cir. 1974) (not "obviously insubstantial"); Norfolk &

These circuits, unlike the Tenth Circuit in the present case, are mindful of this Court's statement in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 566 (1946), that the intent of Congress in creating the NRAB was to leave a "minimum of responsibility" in the courts to resolve disputes growing out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.

The standard was well-stated in *Airline Stewards & S. Assn., Loc. 550 v. Caribbean Atl. Airlines, Inc.*, 412 F.2d 289, 291 (1st Cir. 1969):

> It may be that the district court's interpretation of the contract will ultimately prove to be correct. But in deciding whether to assume jurisdiction to grant injunctive relief, the court's task is not to interpret the contract. It is to determine whether the contractual defense is frivolous. *Otherwise the arbitration machinery mandated by the Railway Labor Act will be dealt a crippling blow.* [Emphasis added.]

P.B.L.R. Co. v. Bhd. of R. Trainmen, 248 F.2d 34, 43, n.4 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958) (not so "insubstantial" as to amount to an "apparent attempt to circumvent the prohibitions" of the Act.); St. Louis Southwestern Ry. Co. v. United Transp. U., 646 F.2d 230, 233 (5th Cir. 1981) ("arguably" covered by the agreement and "not fictitious or merely colorable"); Local 1477, United Transp. U. v. Baker, 482 F.2d 228, 230-231 (6th Cir. 1973) (arguable, not obviously insubstantial); United Transp. U. Gen. Comm. of Adj. (Prop. of P. C. Co.) v. Baker, 499 F.2d 727, 731 (7th Cir. 1974), *cert. denied*, 419 U.S. 839 (not frivolous); Independent Federation of Flight Attendants v. Trans World Airlines, Inc., 655 F.2d 157 (8th Cir. 1981) (arguably justified, reasonably susceptible, not obviously insubstantial).

See also the recent decision of the First Circuit in *Carbone v. Meserve,* 645 F.2d 96, 100 (1981), *cert. denied,* 50 U.S.L.W. 3248 (U.S. Oct. 6, 1981) (No. 81-36):

> Courts should be the last, rather than the first, resort, particularly so if circumventing the Adjustment Board can bring preliminary relief at little attendant risk. [Citation omitted.]
>
> In sum, there may be a violation of the contract, but this is a question of interpretation, and as such is outside of our jurisdiction.

The wisdom of this rule is apparent. Any time that a federal court opines on the merits of an interpretation issue—as the Tenth Circuit did here—the congressional scheme favoring arbitration is thwarted. Whichever way the court comes out, once it has ruled on the merits, arbitration would be pointless. The better view, that of all other circuits that have considered the issue, is that if the agreement language and past practices are ambiguous and capable of an interpretation favoring either side, the dispute is minor and should be referred to arbitration.

This view makes sense. The Adjustment Board has the expertise to resolve these questions and has been designated by Congress to do so. As the Eighth Circuit pointed out in *United Transportation U. v. Burlington Northern, Inc.,* 458 F.2d 354, 357 (1972):

> . . . the line between changes in working conditions which are or are not allowed by a contract is very thin and therefore any attempt by a court to make a definitive resolution of this question would tread upon the exclusive jurisdiction of the adjustment agencies. Accordingly, the test to be applied is that if the contract is reasonably susceptible to the interpretations sought

> by both the carrier and union, the dispute is minor and within exclusive adjustment jurisdiction. . . . [citations omitted.]

The Tenth Circuit here did not express any disagreement with these decisions or the logic behind them. It simply chose to ignore them.

This action was both erroneous and mischievous. It will encourage unions to strike, or file lawsuits seeking injunctive relief, any time a carrier makes even a minor technological change that, in the union's view, constitutes a change in the status quo. It is an open invitation to the parties to avoid the mandatory arbitration procedure whenever it suits them. In the present case, although no employee was adversely affected and although the company had taken all possible steps to hire additional employees rather than contract outside, the Union has now been told by the Tenth Circuit that it had the right to strike. A stream of needless and economically destructive strikes over what should be arbitrable minor disputes can be expected until this Court makes it clear that, if the position of both parties is not frivolous, arbitration is the exclusive remedy.

The court of appeals purported to rely on *Detroit Toledo Shore Line Co. v. United Transportation U.*, 396 U.S. 142 (1969). But that reliance is misplaced. The *Shore Line* case involved a quite different factual situation, since there was no real ambiguity or doubt concerning the nature of the working conditions that existed under the agreement.[9] The

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[9]The railroad there had one terminal and the men had always reported there. Requiring them to report to a new terminal 35 miles away constituted, on the facts of that case, a material change in

Supreme Court has not yet addressed the issue presented here: Whether railway labor disputes must be referred to the NRAB in the first instance when it cannot be said with certainty that the agreement either contemplates or does not contemplate the action in question.

Guidance is urgently needed. This Court should restore the essential uniformity of decisional law needed by the nationwide rail system by reversing the erroneous decision of the Court of Appeals for the Tenth Circuit.

II

THE COURT OF APPEALS ERRED IN FINDING THAT SECTION 6 PROPOSALS AND INFORMAL EFFORTS TO RESOLVE DISPUTES CAN BE CONSTRUED AS ADMISSIONS THAT THE SUGGESTED CHANGE IS PROHIBITED BY THE EXISTING AGREEMENT.

A. The Decision Conflicts With Holdings of Other Circuits.

In concluding that outside contracting was not authorized under the existing agreement, the court of appeals discussed at length (App. at 12-16) and apparently relied on the fact that Cotton Belt had in 1963 and again in 1981 sponsored (either individually or as part of an industry effort) a proposed amendment of the agreement that would

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their commuting time and deadhead arrangements—in short, a change in working conditions, obvious and admitted.

The Tenth Circuit interpreted *Shore Line* as meaning that a railroad has no management rights unless spelled out in the agreement. But this is not what *Shore Line* said, as the Court made it clear that management has unwritten rights if they have been exercised in the past. *Shore Line, supra* at 154-155.

have had the effect of explicitly authorizing outside contracting.[10] That this proposal was made was, in the court's view, evidence that the existing contract did not allow contracting. To the same effect, the court also pointed to a 1980 effort by the Cotton Belt to settle the dispute with the Union. By treating these events as admissions (*See* App. at 15), the court acted in a manner contrary to the intent of the Act and the decisions of other circuits.

The 1963 proposed amendment referred to by the court was part of a national bargaining effort. It was a uniform counterproposal and served by 107 carriers in response to the union's national wage notices.[11] Because work rules and practices varied among the railroads, paragraph 1(c)2 of the proposal contained a savings clause providing that the "fact that the subject matter is included in this uniform Attachment A is not to be construed as an admission that such limitation or restriction exists on this carrier"

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[10]These written proposals were served pursuant to section 6 of the Railway Labor Act (45 U.S.C. § 156) which requires that all negotiations for a formal change in the agreements begin with either side giving the other thirty days' written notice of the requested language change. *Rutland Railway Corp. v. Bhd. of Loc. Eng'rs.*, 307 F.2d 21, 25 (2d Cir. 1962), *cert. denied* 372 U.S. 954. By reason of that statutory requirement, proposals for changes in agreement language are commonly referred to as "section 6 proposals." On many occasions, the same "national" proposal or counterproposal is served by all the railroads, and negotiations are thereafter handled on a national basis by a carriers' conference committee. *Rutland Railway Corp. v. Bhd. of Loc. Eng'rs., supra* at p. 25; *Delaware & Hudson Railway Co. v. United Transp. Union*, 450 F.2d 603, 605 (D.C.Cir. 1971).

[11]*Report to the President of Emergency Board No. 159*, April 13, 1965, pp. 3-7. The uniform national carriers' section 6 counterproposal is reproduced in the Appendix at 63-65.

(App. at 65). The court of appeals ignored the savings clause and apparently considered the 1963 national proposal as evidence that the right to contract did not exist.[12]

The court of appeals also gave unwarranted effect to the Cotton Belt's February 2, 1981, section 6 counterproposal seeking to add a "note" to the agreement, clarifying that it had the right to contract. Again, the court apparently regarded this proposal as support for the Union's position, despite the fact that the district court had found, based upon its view of the live witnesses, that the intended purpose of the notice was to "codify" Cotton Belt's claimed right to contract, rather than to alter the agreement and permissible practices under it (Finding No. 33; App. at 42-43).

The Tenth Circuit's apparent construction of these section 6 notices as admissions that the existing agreements and past practices prohibit contracting is in conflict with the decisions of every other circuit considering the issue.

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[12]That the Tenth Circuit's interpretation was unwarranted is further illustrated by the fact that on May 1, 1963, the *union* had served a national section 6 notice seeking to change the agreement to expressly *prohibit* contracting. *Report to the President of Emergency Board No. 159*, p. 12. The Tenth Circuit was unaware of the existence of this demand, served several months after the carriers' proposal, because it was not introduced in evidence until a hearing on the union's application for an injunction to enjoin all contracting held on January 18, 1982. That notice is reproduced at page 66 of the appendix. The union request for an injunction, after the reversal by the Tenth Circuit, also illustrates that the contracting dispute will continue until the former lines of the Rock Island are totally rehabilitated.

For example, in *Carbone v. Meserve, supra,* the carrier had served on the union a section 6 proposal to eliminate any restriction on consolidation of crew dispatching facilities. The carrier subsequently took unilateral action withdrawing crew dispatchers from a particular facility. The district court found (as did the Tenth Circuit in the present case) that the section 6 proposal was evidence that the unilateral action was prohibited by the agreement. The Court of Appeals for the First Circuit reversed, saying that it "can see no adverse inference to be drawn" from the section 6 proposal or its withdrawal (654 F.2d at 100) and that a proposal to eliminate a rule, and determination of what is permissible under the existing rule, "are two quite different matters" (*id.*). In other words, the First Circuit recognized that the bargaining proposal had no bearing on the issue of what is permissible under the existing agreement and practices or on whether a dispute over the issue is major or minor.

To the same effect is *Delaware & Hudson Ry. Co. v. United Transportation Union,* 461 F.2d 671 (2d Cir. 1971), where the carrier had served a section 6 counterproposal. The union subsequently threatened to strike, claiming that the counterproposal was evidence that an action by the railroad was prohibited and that the dispute was a major one. The railroad withdrew its counterproposal and obtained a permanent injunction against the strike. The Court of Appeals for the Second Circuit affirmed, stating that "neither the filing nor the withdrawing of the . . . counterproposal" could determine the nature of the dispute. 461 F.2d at 673.

These courts, as well as two other circuits,[13] have recognized that the existence or non-existence of a section 6 proposal does not affect a carrier's rights under the agreement then in force.

The same is true with respect to the language in the "Miami Accord," requiring future negotiation of "contracting" (pursuant to existing agreements) and the September 1980 informal request of the Cotton Belt for an agreement allowing contracting for the duration of the rehabilitation projects. Although the Tenth Circuit's decision is less than clear on this point, apparently it viewed these events as further evidence that contracting was prohibited (App. at 13-15). Any such conclusion would also be in conflict with the decisions of other circuits described above. If, as those circuits hold, formal section 6 notices are not admissions that convert a minor dispute into a major dispute, then the Miami Accord covenant to negotiate contracting and the informal effort of the Cotton Belt to peacefully settle the dispute in September of 1980 cannot be construed as converting the dispute into a major one. Further, any such use

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[13]*See also:* Rutland Railway Corp. v. Bhd. of Loc. Eng'rs., 307 F.2d 21, 33 (2d Cir. 1962), *cert. denied,* 372 U.S. 954 (dispute over abolition of terminals and reduction in freight runs considered a minor dispute despite a pre-existing national section 6 notice seeking to eliminate all restrictions on consolidating and abolishing crew terminals); United Transportation Union v. Georgia Railroad, 452 F.2d 226 (5th Cir. 1971) *cert. denied,* 406 U.S. 933 (dispute over change in terminals a minor dispute despite a pre-existing national notice for a specific rule allowing establishment and movement of terminals); Hilbert v. Pennsylvania R.R., 290 F.2d 881 (7th Cir. 1961), *cert. denied,* 368 U.S. 900 (dispute over terminal re-assignment still a minor dispute despite a pre-existing national notice on the same general subject).

of these events would be contrary to the Act's objective of encouraging parties to meet and settle every dispute, whether major or minor.

B. The Decision Will Severely Affect Bargaining Over Proposed Changes In Railway Labor Agreements And Efforts To Resolve Grievances Peacefully.

As indicated above, *all* courts of appeal (except the Tenth Circuit) that have considered the issue have held that the serving of a section 6 notice or counterproposal cannot be construed as an admission or as evidence that the party serving the notice or counterproposal lacks the right in question. The reasons for this conclusion are obvious. The contrary result (*i.e.*, the result reached by the Tenth Circuit) could, as a practical matter, transform the bargaining and negotiation process mandated by the Act into a mine field. Presumably, any right not unambiguously covered by an existing agreement could be lost if it were ever the subject of a section 6 proposal.[14] The unavoidable effect will be a drastic reduction in the scope of nationwide bargaining. Railroads and their unions cannot be expected to engage in national handling of problems and proposals if that were likely to lead to the unintended loss of ambiguous rights.

Not only is the Tenth Circuit decision likely to affect adversely both national and individual section 6 bargaining, but it also makes it impossible for the parties to comply

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[14]Indeed, one foreseeable effect is that unions and railroads would review all past section 6 notices issued by the other side in order to claim that any proposals embodied in those notices constitute admissions that the proposal is inconsistent with the present agreement.

with the Act's requirement that they make good faith efforts to resolve minor disputes prior to arbitration.[15] Under the approach of the Tenth Circuit, if a party seeks to settle a minor dispute prior to arbitration by requesting language codifying a claimed right in an ambiguous situation, that peaceful effort becomes evidence that it has lost the claimed right. The only option remaining would be to litigate every dispute, either before the National Railroad Adjustment Board or before the courts.

These results are violently in conflict with the policies of the Railway Labor Act, which are founded upon a dynamic process of negotiation and adjustment. The decision of the Tenth Circuit should not be allowed to stand. This Court should affirm the holdings of all other courts of appeal considering the issue that the issuance of notices and settlement proposals has no effect upon the interpretation of the existing collective bargaining agreement or on practices permissible under the agreement.

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[15]In this case the railroad was *required* by section 2 of the Railway Labor Act to meet and attempt to resolve the dispute even though it claimed the right at issue:

> Section 2(First) and (Second) impose a duty on both parties to make every reasonable effort to settle a dispute whether it be major or minor, and, as a part of their efforts to confer over their differences. Section 2(Sixth) provides the procedure for calling a conference to discuss a minor dispute. These conferences are to take place before a submission of the dispute to the Railroad Adjustment Board. [Rutland Railway Corp. v. Bhd. of Loc. Eng., 307 F.2d 21, 39 (2d Cir. 1962).]

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Appendix

Appendix A

Publish

United States Court of Appeals
Tenth Circuit

No. 81-1943

St. Louis Southwestern Railway Company,
Appellee,

vs.

Brotherhood of Railroad Signalmen, Pacific Southwest General Committee, R. T. Bates, G. G. Ruhl, J. T. Bass, K. D. Raney, O. C. Lewis,
Appellants.

[Filed Dec. 1, 1981]

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 81-4143)

Robert S. Bogason, San Francisco, Ca., (Mark Bennett, Jr., Davis & Bennett, Topeka, Kansas, with him on the brief) for Plaintiffs-Appellees.

Harold A. Ross, Ross & Krushaar Co., Cleveland, Ohio (John C. Frieden, Ralston & Frieden, Topeka, Kansas, with him on the brief) for Defendants-Appellants.

Before HOLLOWAY, DOYLE and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

OPINION

The Brotherhood of Railroad Signalmen here appeals a judgment which was entered by the United States District Court for the District of Kansas on July 23, 1981. The judgment granted the plaintiff-appellee's motion for preliminary injunction and enjoined the Brotherhood from engaging in a strike which grew out of a change by the Railroad in the manner of employing signalmen. Simultaneously, the court denied the Brotherhood's cross motion for preliminary injunction which would, if granted, have prevented the carrier from contracting out some of the work of the signalmen who were represented by the appellant Union. The injunction was granted pending exhaustion by the Railroad of negotiation and mediation procedures provided by the Railway Labor Act. 45 U.S.C. §§ 155, 156.

In the district court it was the contention of the appellee Railroad that the controversy between the parties was a minor dispute which was limited to the interpretation and application of the collective bargaining agreement, and consequently was subject to arbitration before the National Railroad Adjustment Board pursuant to the Railway Labor Act. The district court so held. At the time of the hearing on the preliminary injunction, Cotton Belt (the Railroad) had not submitted the matter to arbitration; the trial court had directed it to submit the case to the Adjustment Board within thirty (30) days following the issuance of the injunction.

The Union's position is the opposite. It maintains that the dispute is a major one, and it sought an injunction prohibiting Cotton Belt from contracting with an outsider to bring in his employees to do signal work. Its claim was and is that the collective bargaining agreement, past practices and the Railway Labor Act, together with historic understanding prohibited the employment of a contractor and *his* employees.

The trial court's injunction prohibited the defendant Union and certain of its officers from striking plaintiff-appellee, the St. Louis Southwestern Railway Company (the Cotton Belt). The district court found that the dispute was a minor one and that the strike was, therefore, not permissible. The position of the Brotherhood continues to be that the existing collective bargaining agreement, together with past practices, prohibits contracting because it does not recognize contracting outside of an emergency condition like the existence of a world war. The Union also claims that the dispute is a fundamental one which deals with working conditions and that it has a right to proceed in accordance with the collective bargaining agreement requirements; that it is a major dispute is apparent from the attempted change in employment practices by the introduction of an indirect employment method not provided in the agreement.

The original 1940 collective bargaining agreement, and all subsequent agreements, have not provided specifically for either allowing or prohibiting the contracting of work. It is contended by the Company that, as a result of manpower shortages in World War II, the Cotton Belt regu-

larly used outside contractors to perform extensive signal construction work, all without objection from the Brotherhood. After World War II, it states, the Company was able to hire sufficient signalmen and therefore did not use outside contractors, with rare and inconsequential exceptions.

In 1980, the Cotton Belt acquired the line of the bankrupt Chicago, Rock Island and Pacific Railroad, which is called the Rock Island, between Tucumcari, New Mexico and Kansas City, Kansas. In order to restore the line from its deteriorated state, the Cotton Belt agreed to spend $97,000,000 in rehabilitation of the line. It planned to hire as many signalmen as possible for the necessary construction projects, but in June of 1981 it was unable to hire quite enough signalmen to complete all of the rehabilitation project, and so, after efforts to change the collective bargaining contract, it unilaterally hired Serrmi Corporation to perform work involved in the installation of a centralized traffic control system between Harrington and Topeka in Kansas. The Brotherhood threatened to strike and this lead to the issuance of the preliminary injunction which enjoined the threatened strike. At the same time, Judge Rogers denied the Union's requested injunction which aimed to prevent the contracting approach. The trial court found that the dispute was a minor one. The court relied largely on the fact that the contracting had proceeded without objection during World War II, plus the fact that the collective bargaining contract did not prohibit contracting in express terms.

The Brotherhood asserts that the trial court erred in the following particulars:

1. In ruling that the Cotton Belt did not violate the Railway Labor Act, 45 U.S.C. § 151, et seq., when it unilaterally contracted out signal work without completing the negotiation and mediation procedures set forth in that Act.

2. In finding that the unilateral action of contracting under the circumstances was a minor dispute, and that therefore the Union could not validly strike in response to the carrier's action; in concluding that the Cotton Belt was not to be enjoined from pursuing the unilateral change in working conditions, and in failing to require exhaustion of the major disputes procedures of the Railway Labor Act.

3. In holding that the controversy was a minor dispute subject to arbitration before the National Railroad Adjustment Board, which ruling was based largely on the fact that there was not a positive prohibition against Cotton Belt contracting out the work of signalmen; in finding that such a positive provision was unnecessary under the law.

4. In granting, under the circumstances of the case, injunctive relief to the Cotton Belt, especially due to the fact that it had failed to exhaust its remedies under the National Railroad Adjustment Act.

DID THE TRIAL COURT ERR IN HOLDING THAT THE COTTON BELT'S CONTRACTING OUT OF SIGNAL WORK, VIEWED IN THE CONTEXT OF THE SURROUNDING CIRCUMSTANCES, DID NOT CONSTITUTE A VIOLATION OF THE CONTRACT WITH THE SIGNALMEN'S UNION OR OF THE RAILWAY LABOR ACT 45 U.S.C. § 151, et seq.?

The Union cites a good deal of the history of the relationship between it and the Cotton Belt as circumstantial evidence that contracting out the work of signalmen is invalid. Its brief cites the first agreement between the Union and Cotton Belt, which was dated September 5, 1940. Since that time, there have been various collective bargaining agreements governing rates of pay, rules and working conditions for employees in the craft of signalman; this Union is the bargaining agent for these workers. It is also known that customs and practices have become as much a part of the working conditions of the employees as express conditions set forth in the written agreements.

As we have indicated, the basic issue in the case is whether the dispute is minor or major. Different procedures govern these two types of disputes. Major disputes involve basic differences with respect to working conditions or existing agreements, or new agreements or addition of new provisions. Major disputes go first to mediation pursuant to 45 U.S.C. § 155. If that fails, arbitration must be offered and accepted or rejected. A minor dispute is considered a question of interpretation of the agreement. In that instance, the controversy is submitted for compulsory arbitration before the National Railroad Adjustment

Board. If a dispute is minor and relates to a provision of an existing bargaining agreement, a strike is viewed as unlawful and must be enjoined while the dispute is submitted to the Adjustment Board. That, in essence, is why the trial court granted the injunction after finding that the dispute was minor. Brotherhood of Railroad Trainmen v. Chicago River and I. R.R. Co., 353 U.S. 30 (1957). This decision is said to be the principal authority on the issue of definition of the dispute. It holds that if the dispute is a minor one, a strike is unlawful and is enjoinable, and that the remedy is arbitration by the National Railroad Adjustment Board. So, then, this appeal considers whether the dispute was indeed a minor one, as the trial court found, and whether an injunction against the strike was appropriate.

Both the Company and the Union rely on more or less the same factual sources in their arguments; opposite conclusions are drawn from the facts. The Railroad seeks to establish that the dispute is a minor one and the Union maintains that it is a major issue. The trial court's findings of fact are accurate and are not disputed. Here again it is the conclusions which are disputed.

A. *Whether The Agreement Embraces This Dispute*

In their first agreement, a letter dated September 1, 1940, the parties contracted to jointly observe the rules and working conditions of the current agreement between the Railroad and the employees of the "signal department" represented by the Brotherhood of Railroad Signalmen of America, and the current rates of pay on the Southern Pacific Lines in Texas and Louisiana, which were

effective April 16, 1940. Since then, the signalmen's union and the Cotton Belt have agreed to various collective bargaining agreements governing the rates of pay, rules and working conditions for employees in the craft of signalmen. No other union is authorized under the law to carry out that function. Certain customs have developed in the years since the first contract was agreed upon.

Both sides agree that the contract does not deal *expressly* with whether the dispute is major or minor, nor has the agreement ever purported to deal with the question of contracting for the performance of work. Indeed, there was no occasion for it to do so because the contract governs the working conditions, pay, etc. of all of the employees. Such a provision would be foreign. The one time that contracting was used to any extent was during World War II. This was a result of emergency manpower shortages. The Cotton Belt then regularly used outside contractors to perform signal construction work. The initial contracts between the parties were then in force and there were no objections from the Brotherhood. But after World War II, the Company was able to hire signalmen, so it says, and therefore did not use outside contractors, except on rare occasions, which occasions are not relied on. For thirty-five years, the issue was not seriously advanced by Cotton Belt, altough some *attempts* were made to bring about adoption of a stipulation allowing such contracting.

This present dispute had its beginning in 1980 following acquisition by the Cotton Belt of the bankrupt Chicago, Rock Island and Pacific Railroad. This is called the Rock Island, or sometimes the Tucumcari. We are here con-

cerned with that part of the Rock Island between Tucumcari, New Mexico and Kansas City, Kansas. Cotton Belt had agreed to extensive rehabilitation work and it planned to hire as many signalmen as possible for the construction projects. It claims that it was unable to hire all of the signalmen needed for this purpose and, therefore, it had to go to a contractor. It hired Serrmi Corporation to perform work involved in the installation of the centralized traffic control system between Harrington (sic) and Topeka in Kansas. This was done unilaterally. The final problem involved was the employment of a small number of men (through the contractor) for a temporary period of some twenty-seven months so as to complete the work by the end of 1981.

The Railroad believes that the contracting was arguably allowed by the existing agreement and past practices. It looked for the most part to the World War II period as furnishing a precedent for contracting. The Cotton Belt's argument rests on the fact that none of the collective bargaining agreements ever contained an *express* prohibition against farming out jobs to contractors. So one of the questions presented is whether this fact places the burden on the Union to overcome any inference which might arise from the absence of such a provision in express form, or whether it was essential that the right to contract be spelled out in order for the issue to be resolved in favor of the railroad. The precedent relied on has little value. An emergency existed during the war which was not present when the subject conflict arose. In any event, the Cotton Belt had previously offered an authorizing amendment to the agreement on two or three occasions, but each

time withdrew it in the face of the Union's objection. The agreement does not evidence that contracting could be used.

B. *The Provisions of the Scope Rules—Whether a Consent to Contracting is to be Inferred*

Following the adoption of the letter agreement in 1940, there was a 1943 agreement which did not contain any express prohibition of contracting. That agreement reads as follows:

> Scope Rule: This agreement governs the rates of pay, hours of service, and working conditions of all employees in the signal department (except supervisory forces above the rank of foreman, clerical forces and engineering forces) performing the work generally recognized as signal work, which work shall include the construction, installation, maintenance and repair of signals, . . . centrallized (sic) traffic control systems, signal shop work and all other work generally recognized as signal work.

There was another paragraph which said:

> It is understood the following classifications shall include all the employees of the signal department performing the work enumerated under the heading of 'Scope.'

This 1943 agreement remained substantially unchanged until it was revised effective October 1, 1970. The 1970 agreement, it is said by the Company, contains no prohibition against contracting. The 1970 Scope Rule remains essentially the same as in the original agreement incorporated in 1940. The 1970 Scope Rule provided:

> This agreement shall apply to work or service performed by the employees specified herein in the signal

> department, and governs the rates of pay, hours of service and working conditions of all employees covered by Article I, engaged in the construction, reconstruction, installation, maintenance, testing, inspecting and repair of wayside signals, pole line signal circuits and their appurtenances, interlocking, spring switch locking devices, highway crossing protection devices and their appurtenances, wayside train stop and train control equipment, detector devices connected with signal systems, including centralized traffic control systems, car retarder systems and hot box detectors and car counting devices when used in connection therewith, dragging equipment detector devices, electric switch lamps, and all other work generally recognized as signal work performed in the field or signal shops. . . .

This contains an all-inclusive description of the work performed and to be performed by the signalmen. It apparently includes the work which was contracted out. Cotton Belt maintains that until it acquired the Tucumcari line of the bankrupt Rock Island Railroad, it was able to hire sufficient qualified signalmen to perform all necessary signal work. Prior to 1980, it chose to use its own signalmen to perform the work and it always had a sufficient number of signalmen to perform the work. But now it says that the precedents set during World War II, and during the interim period between the war and 1980, when manufactured items were farmed out and installed, in very limited instances, gave to it the implied right to contract out part of the work described in the contract. Although the Union does not dispute that work was contracted out during the war, the Union disputes the asserted effect of that contracting. It

contends that the Scope provisions provide in detail for all of the work and make no exception whatsoever; that contracting from an outsider is so much of a departure that it demands an express provision in order to justify it; that the absence of such provision shows that this was not an accepted way to obtain manpower for the purpose of performing the signalmen's work.

There is not much of a positive nature in the agreement which can be pointed to by Cotton Belt to support its position. The agreement purports to cover all of the work of the employees and apparently leaves no room for unilaterally contracting out some of the work.

In any event, the Union notes that in 1963 a so-called Section 6 notice was given by the Railroad which made express provision for contracting out. This read:

> a. Eliminate all agreements, rules, regulations, interpretations and practices, however established, which in any way handicap or interfere with the carrier's right to:
>
> (2) Contract out work; . . .

Thus, an attempt was made by the Cotton Belt to include the right to contract out work. It did not become part of the agreement. The Union argues that this effort was an admission by the Railroad that the contract needed to be expressly changed in order to eliminate interpretations and practices which impair the carrier's right to contract out work. The Railroad denies that this constituted an admission, saying that it was being used as a bargaining tool.

The Cotton Belt submitted another similar attempted change which, it explains, was a mere counter proposition, dated February 2, 1981. This read:

1. Scope Rule:

Add the following Note:

Note: When it deems necessary, the company shall have the right to subcontract the work set forth in the Scope Rule. As the company decides that it is necessary to subcontract work of the type set forth in the Scope Rule, it should give the general chairman advance notice of intent, except in the case of minor transactions.

The Union maintains that this is an additional admission on the part of the Railroad that the contract did not impliedly allow contracting out since such a provision as the 1981 proposal was necessary.

Moreover, it tended to show that the Cotton Belt was bent on establishing this as a right. The Railroad claims that it was merely seeking to codify that which already had recognition; that it was included as a note rather than a change because it was only to be an agreed upon interpretation of existing disputed language. The trial court made a finding adopting completely the line of the Railroad. It said:

> The intended purpose of this counterproposal was to codify the discretionary right which the Cotton Belt had to employ outside contractors and the actual practice of having used outside contractors in the past.

The Court continued:

> Furthermore, the railroad intended to use this counterproposal as a bargaining device in the negotiations

> that would arise under the section 6 notice (which it had filed seeking to change the agreement so as to include an express authority to contract out).

The Railroad maintains that the findings are correct, that they are supported by common sense and that it merely intended to settle the dispute by contract rather than risk liability for penalty payments if it chose to contract and the Brotherhood submitted grievances which would have been arbitrated under the Railway Labor Act.

The Brotherhood contends also that the Cotton Belt's September 16, 1980 request for a memorandum agreement specifically allowing contracting was an admission that the existing basic agreement did not recognize contracting. Again, it was said to be a good faith effort to resolve the dispute by specifically agreeing that the Cotton Belt would contract out work, on a non-precedent setting basis, until completion of the Tucumcari line rehabilitation project.

The Brotherhood also argues that Article II, ¶ 9 of the so-called "Miami Accord" was an affirmance by the Railroad of the prohibition against contracting, by declaring it to be subject to negotiation.

Article II, ¶ 9 of the Miami Accord reads as follows:

> (e) Special Projects—Protection, seniority and contracting pursuant to existing agreements in special rehabilitation projects (such as the rehabilitation of that part of the Rock Island which was purchased by the Cotton Belt will be subject to negotiations between individual purchasing carriers and interested employee representatives.

The Accord resulted from a meeting on March 4, 1980 of Cotton Belt, other railroads and the Signalmen's Union, together with other railroad unions, to reach an agreement to provide a fair and complete arrangement for the employees of the bankrupt carriers. It affirmed work practices prohibiting the unilateral contracting out of signal work.

The Railroad explains that this was not intended to change agreements so as to allow contracting; that it was only intended to require negotiation of the contracting issue where existing contracts and practices actually prohibited contracting. The purpose of the agreement was to set the protection benefits, so they say, for any former employees of the Rock Island that might be hired by those railroads subsequent to their acquisition of any portion of the Rock Island.

One thing emerges in clear relief from the literature and other circumstances discussed above on this question of major or minor as applied to the dispute concerning contracting out work. This is that the Company desired to change the contract so as to expressly allow farming out work at will to contractors. The Union was aware of this effort and consistently opposed it. The obvious reason for this opposition was that it required the Union to give up an important stick in the bundle of rights. To have given up on this would have resulted in the Railroad using it as a significant precedent, just as they attempt to use the World War II contracting. Moreover, the contracting out method has a strong tendency to undermine the function of the Union, the duty of which is to guard

the work rights of its members. Also, the right to employ an independent contractor in order to get a job done—work which normally belongs to the members of the Union—is out of harmony with the entire collective bargaining relationship. The Scope Rule provisions themselves certainly undertake to cover and embrace all of the Railroad employees. Thus, if there is to be any exception it would seem that it ought to be expressly stated.

C. *The Railway Labor Act—The Fundamental and Organic Law*

The Railway Labor Act, 45 U.S.C. § 151, et seq., is the basic body of law defining the employer-labor rights and duties. Section 152, *Fourth*, provides for organization of unions and bargaining collectively through representatives of the employees' own choosing. It provides that the majority of any craft or class of employees have the right to determine who shall be their representatives. No carrier or its officers or agents has any right to question the right of employees to join, organize, or assist in organizing the labor union of their own choice. The Act declares it to be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier to form a competing labor organization.

Part *Fifth* of § 152 prohibits an employer from requiring any person to sign any contract or agreement promising to join or not to join a competing labor organization and, if any such contract has been enforced prior to the effective date of the law, then such carrier shall notify the employee that such contract has been discarded and is no longer binding in any way.

Part *Eleventh* of § 152, subsection (a) provides that any labor organization authorized to represent employees in accordance with this Act, shall be permitted

> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: PROVIDED, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Subsection (b) authorizes labor organizations and carriers

> to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

This provision does not take effect until the employee executes an assignment and delivers it to the carrier authorizing the transfer of such funds. Subsection (c) states:

> The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 . . . , if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: PROVIDED, HOWEVER, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: PROVIDED, FURTHER, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

Thus, sub-section (c) declares that membership in a union may be required as a condition to continued employment.

From the above partial summary it is apparent that the Railway Labor Act contemplates that the various crafts are to represent all of the employees, and contains strong provisos that the employees must be members of the particular craft union that represents any area of work. It is impossible to read these and other sections of the Railway Labor Act without concluding that the day to day work of railroads is to be performed by employees of the company who are members of the applicable union. Thus, closed shop unions are authorized by the Act. The statutes are so all-inclusive and preemptive that they leave no room for a different kind of employment such as contracting. Obviously, employees of contractors would be unable to comply with the requirements of the statutes. There is nothing which leaves room for suggestion that the statutes can be avoided by employing a contractor to perform the work. Any such effort is at odds with the Railway Labor Act. We need not consider whether dire necessity could give rise to contracting because such necessity is not presented. That which is before us is certainly inadequate.

D. *The Court Decisions*

The decisions of the Supreme Court in Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union, 396 U.S. 142 (1969), is similar to this case both factually and legally. In *Shore Line,* a labor dispute arose between the petitioner railroad and the union growing out of the petitioner railroad's proposal to establish new outlying work assignments away from the principal yard. As in this case,

there was nothing in the collective bargaining agreement expressly prohibiting such assignments. The Union filed a notice under Section 6 of the Act opposing the change in the agreement and, after the failure of the parties to negotiate a settlement, invoked the services of the National Mediation Board. While the proceedings were pending before the Board, the railroad unilaterally announced the creation of the disputed work assignments. The union then threatened to strike. The railroad sued to enjoin the strike; the union counterclaimed (as it did here) for injunction prohibiting the establishment by the railroad of the outlying assignments on the ground that Section 6 was not being followed. That statute provides, in part:

> In every case where . . . the services of the Mediation Board have been requested by either party, . . . rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Mediation Board. . . .

45 U.S.C. § 156.

The district court in *Shore Line* dismissed the railroad's complaint, and at the same time granted the union's request for injunction restraining the railroad from establishing any new outlying assignments. This action was taken despite the absence of an express provision prohibiting such changed assignments in the collective bargaining agreement. The court of appeals affirmed. The Supreme Court held that the status quo, which is to be maintained pursuant to Section 6 of the Railway Labor Act while the procedures of the Act are being exhausted, consists of the actual, objective working conditions out of which the dispute arose, *whether or not those conditions are covered in*

the existing collective bargaining agreement. The district court had also held that the status quo requirement of Section 6 of the Act prohibited Shore Line from making outlying assignments even though there was nothing in the parties' agreement which prohibited such assignments. The railroad had contended that the purpose of the status quo provision of the Act was to guarantee only that existing collective bargaining agreements continued to govern the parties' rights and duties during efforts to change those agreements. Therefore, the railroad's position was that what Congress intended by writing in Section 6 that rates of pay, rules or working conditions were not to be altered was that rates of pay, rules or working conditions as expressed in the agreement are not to be altered. It further argued that since nothing in the railroad's agreement with the union precluded the railroad from altering the location of work assignments, this working condition could be altered.

This is much the same approach of Cotton Belt in the case at bar. The Supreme Court stated in *Shore Line* that the language of Section 6 does not say what the railroad would have it say. The Section speaks of rates of pay, rules or working conditions, without limitation to those obligations already embodied in collective agreements. The Court went on to say that:

> [T]he railroad's interpretation of this section is sharply at variance with the overall design and purpose of the Railway Labor Act.
>
> The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful

strikes and interruptions of interstate commerce. The problem of strikes was considered to be particularly acute in the area of "major disputes," those disputes involving the formation of collective agreements and efforts to change them. *Elgin, J. & E. R. Co. v. Burley,* 325 U.S. 711, 722-726 (1945). Rather than rely upon compulsory arbitration, to which both sides were bitterly opposed, the railroad and union representatives who drafted the Act chose to leave the settlement of major disputes entirely to the processes of noncompulsory adjustment. *Id.* at 724. To this end, the Act established rather elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation. *General Committee, B.L.E. v. Missouri-K-T.R. Co.,* 320 U.S. 323, 328-333 (1943). It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted. *Brotherhood of Railroad Trainmen v. Terminal Co.,* 394 U.S. 369, 378 (1969); *Elgin, J. & E. R. Co. v. Burley, supra,* at 721-731; *Texas & N.O.R. Co. v. Brotherhood of Railway & S. S. Clerks,* 281 U.S. 548, 565-566 (1930). A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process. As we noted in *Brotherhood of Railway & Steamship Clerks, etc., v. Florida E.C.R. Co.,* 384 U.S. 238, 246 (1966), "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."

The Court went on to explain that:

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interest of the other side and thus reach agreement without interruption to commerce. 396 U.S. at 148-150.

The Court in *Shore Line* also explained that the emphasis in Section 6 is on rates of pay, rules or working conditions as being the elements that shall not be altered during the period from the first notice of a proposed change in agreements up to and through any proceedings before the National Mediation Board.

The *Shore Line* case is not entirely applicable. It is not lacking in importance here, however, because it holds that the concern of the Act is with the basics of working conditions contract. If it were in the contract, there would be no need to attempt to bring about a change and simple arbitration would, perhaps, serve to settle the matter. Thus, the case gives insight into the workings of the Act.

Shore Line also enlightens the present dispute with regard to whether the controversy is a *major* and not a minor dispute. Is it a major dispute or a minor one? Does it introduce a new provision or seek to construe an old provision? The dispute involves an attempt to insert a new provision, and one of high importance which goes to the heart of the employment, namely job security. This shows that a new provision is necessary to the change.

The Supreme Court has also considered the major dispute, minor dispute question. It did so in Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723 (1945). The ultimate question was whether a collective bargaining representative had the authority to settle a monetary claim while it was pending before the Railroad Adjustment Board. The agreement took place after the Adjustment Board had rendered an adjudication. The grievance originally had to do with starting time. Officers of the union settled the monetary claims after the Board had determined the grievance with respect to starting time. The Court ruled that they were not authorized under the Railway Labor Act to make such a settlement. The dissent by Justice Frankfurter took the position that there was authority to settle it by the duly recognized agents of the Brotherhood.

In the course of the majority opinion there were discussions of the differences between major disputes and minor ones. The Court pointed out that major disputes go first to mediation under the auspices of the National Mediation Board, and if that fails, then to acceptance or rejection of arbitration, and finally to possible presidential intervention.

In the case of minor disputes the grievances are submitted to the Adjustment Board. The majority defined major and minor disputes as follows:

> The difference between disputes over grievances and disputes concerning the making of collective agreements is traditional in railway labor affairs. It has assumed large importance in the Railway Labor Act of 1934, substantively and procedurally. It divides the jurisdiction and functions of the Adjustment Board from those of the Mediation Board, giving them their distinct characters. It also affects the parts to be played by the collective agent and the represented employees, first in negotiations for settlement in conference, and later, in the quite different procedure which the Act creates for disposing of the two types of disputes.

In speaking about the two kinds of disputes the opinion states:

> The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the

> employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.
>
> In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world. The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the process of noncompulsory adjustment. 325 U. S. at 722-724.

In the dispute at bar, there is no specific express provision having to do with the subject matter which is in dispute here, that is to say, the right to hire a contractor. The Railroad contends, of course, that this right has taken form and effect as an implied right, but the evidence to establish that contention is practically nonexistent. The Union's position is, of course, that they have never agreed to any such thing, and have consistently opposed it.

The cases support the proposition that a major dispute includes differences arising out of proposals for new contracts or changes in the existing contractual or legal obligations and relations. See Detroit & Toledo S.L.R.R. Co. v. United Transportation Union, 396 U.S. 142 (1969); Florida East Coast Railway Co. v. Brotherhood of Locomotive Engineers, 362 F.2d 482 (5th Cir. 1966). (A dispute arising out of attempt by a railroad to obtain an amendment of grievances which were existing with unions

in order to allow either handling of loading operations by mainline crews or reduction of the personnel of yard crews from five to three constituted a major dispute for purposes of the statute). And a proposal to revise or change a bargaining agreement with respect to employment of firemen on diesel locomotives constitutes a major dispute. Southern Railway Co. v. Brotherhood of Locomotive Firemen and Enginemen, 337 F.2d 127 (D.C.Cir. 1964).

The almost complete dearth of evidence in support of the trial court's determination herein that the case involves a minor and not a major dispute requires that the judgment of the district court be reversed and that the case be remanded to the district court for further proceedings. The district court is directed to vacate the judgment which is heretofore entered in the above case. In view of our determinations, it is unnecessary to consider the other points which have been advanced by the Union. If the trial court deems it necessary to the carrying out of the foregoing opinion, it shall issue an injunction running to the appellee Railroad enjoining it from pursuing the unilateral action which it had taken to have the work in question performed by the contractor. The district court shall undertake such further proceedings as it deems necessary to carry out the decision of this court.

Appendix B

In the United States District Court
for the District of Kansas
Case No. 81-4143

St. Louis Southwestern Railway Company,
Plaintiff,

vs.

Brotherhood of Railroad Signalmen, et al.,
Defendants.

[Filed July 23, 1981]

MEMORANDUM AND ORDER

On July 3, 1981, the plaintiff, St. Louis Southwestern Railway Company (sometimes referred to herein as the "Cotton Belt"), brought this action seeking to prohibit the defendant, Brotherhood of Railroad Signalmen (hereinafter referred to as "BRS"), from engaging in a threatened strike. The BRS had threatened to strike over the plaintiff's utilization of an outside contractor to perform certain work designated as signal work. On that day, this court entered a temporary restraining order preventing the threatened strike until a hearing on plaintiff's motion for a preliminary injunction could be scheduled. On July 10, 1981, the defendants filed an answer and alleged a counterclaim against the plaintiff. In addition, the defendants filed a motion for preliminary injunction seeking to prevent the plaintiff from making unilateral changes in the working

conditions of its signalman employees without complying with the procedures established by the Railway Labor Act.

On July 13, 1981, the court began hearing evidence on the aforementioned motions. Due to the length of the hearing, the court extended the previously entered temporary restraining order for an additional five days. Subsequently, on July 16, 1981, the court again extended the temporary restraining order for a period of five days in order to allow the court to properly consider the extensive evidence that had been offered by both parties. Having carefully considered the evidence, the court makes the following findings of fact and narrative conclusions of law.

FINDINGS OF FACT

1. Plaintiff is a common carrier railroad, organized and existing under the laws of the State of Delaware, doing business in and between the States of Kansas, Louisiana, Illinois, Missouri, Arkansas and Tennessee. The Southern Pacific Transportation Company is the major and controlling stockholder of the plaintiff. Plaintiff is subject to the provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

2. Defendant, Brotherhood of Railroad Signalmen, is a labor organization within the meaning of the Railroad Labor Act.

3. Defendant, Pacific Southwest General Committee, is also a labor organization within the meaning of the Railway Labor Act.

4. All individual defendants are various officials and members of the defendants Brotherhood of Railroad Signalmen and Pacific Southwest General Committee.

5. Plaintiff and defendants are parties to a collective bargaining agreement effective October 1, 1970, which has been revised periodically since that date.

6. The first collective bargaining agreement between the Cotton Belt and the BRS was a letter agreement dated September 5, 1940. It provided, in pertinent part:

> Pending present negotiations to be conducted at some mutually satisfactorily date, the matter of a formal contract will be held in abeyance.
>
> Effective September 1, 1940, and pending the conclusion of formal contract, the carrier and the organization will jointly observe the rules and working conditions of the current agreement between the Southern Pacific lines in Texas and Louisiana and the employees of the Signal Department represented by the Brotherhood of Railroad Signalmen of America effective May 1, 1924, and the current rates of pay on the Southern Pacific lines in Texas and Louisiana which were effective April 16, 1940. . . .

7. The agreement on the Texas and Louisiana lines incorporated by reference through the above letter agreement contained no provision preventing the railroad from contracting out signal work but did contain the following scope rule: "These rules shall apply to employees classified in Article I performing the work generally recognized as signal work."

8. The next agreement between the Cotton Belt and the BRS was made to be effective February 1, 1943, and also contained no prohibition against contracting out of signal

work. The scope rule in that agreement provided as follows:

> This agreement governs the rates of pay, hours of service and working conditions of all employees in the Signal Department (except supervisory forces above the rank of foreman, clerical forces and engineering forces) performing the work generally recognized as signal work, which work shall include the construction, installation, maintenance and repair of signals, interlocking plants, highway crossing protection devices and their appurtenances, wayside train stop and train control equipment, car retarder systems, centralized traffic control systems, signal shop work and all other work generally recognized as signal work.
>
> It is understood the following classification shall include all the employees of the signal department (sic) performing the work enumerated under the heading of "Scope".

9. That language remained unchanged until the agreement was revised effective October 1, 1970. This agreement also contains no prohibition against contracting out signal work. The 1970 scope rule provides as follows:

> (a) This agreement shall apply to work or service performed by the employees specified herein in the Signal Department, and governs the rates of pay, hours of service and working conditions of all employees covered by Article I, engaged in the construction, reconstruction, installation, maintenance, testing, inspecting and repair of wayside signals, pole line signal circuits and their appurtenances, interlocking, spring switch locking devices, highway crossing protection devices and their appurtenances, wayside train stop and train control equipment, detector devices con-

nected with signal systems, car retarder systems and hot box detectors and car counting devices when used in connection therewith, dragging equipment detector devices, electric switch lamps, and all other work generally recognized as signal work performed in the field or signal shops.

(b) When signal circuits are handled on radio, radar or microwave systems, the employees covered by this agreement shall install and maintain the signal circuits leading up to a common terminal where signal circuits are interconnected with other circuits and will take off at a common terminal where Signal Department circuits are again separated from other circuits.

(c) It is understood the following classifications shall include the employees performing the work enumerated under the heading of "Scope."

10. During the years 1940 to 1945, the Cotton Belt used outside contractors to perform certain signal work on its lines. During these years of World War II, qualified signalmen were in short supply and the Cotton Belt utilized outside contractors on several projects, including the installation of centralized traffic control systems in Missouri, Arkansas and Louisiana. The BRS made no complaint and filed no grievance regarding this work by outside contractors during this period.

11. Subsequent to 1945, the Cotton Belt did not contract out signal work but rather used its own signalmen to perform most of the signal work. However, on several occasions, the Cotton Belt was required by lessors of certain equipment to use the lessors' employees to operate the leased machines. The work performed by these individuals was work normally performed by signalmen. The BRS has

voiced no objection to this procedure over the years. However, the BRS pointed out that a signalman is generally present during the operation of the machine and usually supervises the operation.

12. In 1963, the Cotton Belt, in response to a wage proposal by the BRS, served certain counterproposals upon the BRS, including a proposal to provide in the collective bargaining agreement for the right of the carrier to contract out work. This proposal was rejected by the BRS. The BRS has indicated that the Cotton Belt attempted to include the same provision in following agreements. All subsequent proposals were rejected by the BRS.

13. In June, 1978, plaintiff entered into an agreement to purchase the railroad line of the bankrupt Chicago, Rock Island and Pacific Railroad Company (hereinafter referred to as "Rock Island"), between Santa Rosa, New Mexico, and St. Louis, Missouri.

14. In October, 1979, when a bankruptcy court declared the Rock Island cashless, the Interstate Commerce Commission ordered the Kansas City Terminal to operate the Rock Island properties on its behalf. On March 24, 1980, the Commission authorized the plaintiff to operate the Rock Island line from Tucumcari, New Mexico, to St. Louis, Missouri (hereinafter referred to as the "Tucumcari line"). This temporary authority continued until the Commission gave final approval to plaintiff's purchase of that line. The actual sale of the line to plaintiff was consummated on October 30, 1980.

15. The acquisition of the Tucumcari line was of vital importance to the Southern Pacific Transportation Com-

pany, plaintiff's parent line, because it provided them with a shorter shipping route to the midwest.

16. Thereafter, plaintiff applied to the Federal Railroad Administration (hereinafter referred to as "FRA") for a loan to rehabilitate the Tucumcari line under § 505 of the Railroad Revitalization and Regulatory Reform Act of 1976. The Cotton Belt indicated that one of the purposes in seeking the federal loan was to allow the rehabilitation of the line to proceed more rapidly. On September 29, 1980, the loan application was granted and plaintiff entered into an agreement with the FRA to begin rehabilitation projects costing a total of $97 million. The FRA financing agreement requires that the work be completed by the end of 1981.

17. The total rehabilitation of the Tucumcari line was necessary due to the state of the line in 1979. The rehabilitation projects planned by the Cotton Belt were intended to increase the maximum speed along the line, which in some places in 1979 was only ten miles per hour.

18. Among the projects that were to be completed was the total rehabilitation and modernization of the signal system which governs the movement of trains on the Tucumcari line. Rehabilitation and modernization of the signal system included the installation of a new centralized traffic control system between Topeka and Herington, Kansas. The installation of such a system will enable trains to operate more efficiently and safely over this area. The rapid completion of this project is essential to the efficient and profitable operation of the Tucumcari line.

19. After the demise of the Rock Island, the FRA encouraged interested railroads and the labor organizations

to work together in an effort to enable a purchasing carrier to operate sections of the Rock Island in an efficient manner immediately upon authorization for such service. In addition, the FRA encouraged both the labor organizations and railroads to cooperate in employing the unemployed Rock Island employees. As a result of the impetus provided by the FRA, meetings were held between the prospective purchasing carriers and the representatives of the labor organizations.

20. On March 4, 1980, plaintiff and other railroads and the BRS and other railway labor organizations entered into an agreement to provide a fair and complete arrangement for the protection of the employees of the Rock Island. This agreement became known as the "Miami Accord."

21. Article II-9(e) of the Miami Accord provided as follows:

> Special projects—Protection, seniority and contracting (pursuant to existing agreements) in special rehabilitation projects will be subject to negotiations between individual purchasing carriers and interested employee representatives.

The purpose of the insertion of this section was to accommodate the railroads' desire to limit the protection that would be accorded the many temporary employees that would be required only for the rehabilitation projects. Both the BRS and Cotton Belt assert that the language "pursuant to existing agreements" was included to follow the positions that each party asserts in this action. The Cotton Belt asserts that the language was necessary to

make clear that the railroads were only agreeing to discuss "contracting" that was then actually prohibited by existing agreements and past practices. The BRS contends that the language was inserted to emphasize that the collective bargaining agreement of the BRS did not authorize contracting out.

22. In September, 1980, plaintiff proposed, pursuant to Article II-9(e) of the Miami Accord, that defendants BRS and Pacific Southwest General Committee enter into an agreement for the rehabilitation projects on the Tucumcari line. Plaintiff's proposals for the agreement included the following paragraphs:

> The terms of this Memorandum of Agreement will also be applicable to the 1981 phase of the rehabilitation project. However, the subjects of selection of forces and the use of contractor's forces will be the subject of an agreement covering the 1981 phase of the Rehabilitation Project.
>
> • • • •
>
> To the extent that positions and work for the 1980 phase of the Rehabilitation Project cannot be accomplished with eligible Rock Island employees or furloughed Southern Pacific Transportation Company employees (Pacific Lines), and because of the necessity to begin the project in 1980, it is agreed that contractor's forces may be used. However, this agreement as to the use of contractor's forces shall remain in effect through December 31, 1980. In the event that it becomes necessary to utilize contractor's forces during 1981, the parties will negotiate the details of contracting (pursuant to existing agreements).

These paragraphs were proposed in an effort by the railroad to avoid any future problems that might arise with the FRA or the BRS.

23. During September, 1980, representatives of the Cotton Belt met with representatives of the defendants to discuss the future rehabilitation projects. K. R. Peifer, Manager of special projects in the industrial relations department of the Southern Pacific Transportation Company, informed the defendants that in the event that the Cotton Belt was not able to obtain a sufficient number of former Rock Island signalmen, then outside contractors would be employed. On September 16, 1980, the Cotton Belt signed an agreement with the BRS covering the 1980 rehabilitation project. This agreement stated in pertinent part:

> St. Louis Southwestern Railway Company intends to utilize eligible former Rock Island employees and to maximum extent possible for the rehabilitation project. Each of the eligible former Rock Island signal employees will be notified concerning the availability of temporary positions with St. Louis Southwestern Railway Company for the rehabilitation project and each will be given an opportunity to make application for such positions. Additionally, to the extent that positions remain available for the 1980 phase of the rehabilitation project, St. Louis Southwestern Railway Company agrees to notify currently furloughed signal employees on the Southern Pacific Transportation Company of the availability of the remaining temporary positions. Any such Southern Pacific Transportation Company employees indicating a desire to occupy an available position will be given an

opportunity, if qualified, to fill any such positions once they have been offered to eligible former Rock Island employees.

• • • •

Except to the extent specifically provided for in this Agreement, it is not intended to modify or supercede the terms of the March 4, 1980 Agreement.

The paragraphs proposed by the plaintiffs were deleted after an objection was raised by the BRS.

24. During the negotiations of the September 16, 1980 agreement, the representatives for the BRS stated they would attempt to provide additional qualified signalmen from other sources in order to avoid the Cotton Belt utilizing outside contractors. Accordingly, the parties executed a letter, also dated September 16, 1980, which stated:

In connection with the Memorandum of Agreement dated September 16, 1980, relating to St. Louis Southwestern Railway Company's projected rehabilitation project for 1980, the parties have discussed the subject of contracting (pursuant to existing agreements) and have agreed to defer further discussions on the subject until it becomes necessary.

In the event that signal employees are not available from within the ranks of the former eligible Rock Island signal employees or furloughed Southern Pacific Transportation Company signal employees, the Organization agrees to cooperate with St. Louis Southwestern in filling its staffing requirements for the positions listed on Attachment "A" to the September 16, 1980, Agreement.

25. On October 15, 1980, prior to commencing the 1980 phase of the rehabilitation project, Peifer met with BRS representatives and advised them that he had been unable to secure a sufficient number of signalmen to complete the work programmed for 1980 and, therefore, found it necessary to utilize outside contractors. The Cotton Belt had needed 33 signalmen for the projects in 1980, but were only able to hire fifteen journeymen-signalmen to work on these projects. The BRS opposed the use of outside contractors and requested that the Cotton Belt consider utilizing additional assistant signalmen in lieu of journeymen-signalmen. In a letter of understanding, dated October 15, 1980, the Cotton Belt and the BRS agreed that the railroad had the right to determine and establish the number of assistant signalmen positions it required for each rehabilitation gang, but the number was not to exceed six such positions. As a result of the letter of understanding, the Cotton Belt decided not to employ an outside contractor but rather to hire minimally qualified new employees to work as assistant signalmen with the qualified former Rock Island signalmen.

26. Also on October 15, 1980, a "final notice" was sent to all eligible former Rock Island signal employees advising them of the Cotton Belt's 1981 rehabilitation project scheduled to begin on April 1, 1981. The notice requested that they submit their applications for employment prior to November 1, 1980.

27. In November, 1980, Peifer advised the BRS that the 1981 projects would require over 180 signal employees. The Cotton Belt's engineering department had arrived at

this figure. Peifer requested the BRS to cooperate with the Cotton Belt in attempting to locate qualified journeymen-signalmen for employment. Peifer indicated to the BRS that since the railroad had encountered great difficulty in hiring only the 33 signalmen required for the 1980 project, it appeared that unless a supply of signalmen became available from some source, possibly furloughed employees from some other major railroad, then the Cotton Belt would in all likelihood have to employ outside contractors to perform some signal work.

28. The final notice sent to all eligible former Rock Island employees resulted in only 21 responses. After conferring with the BRS, Peifer advised the engineering department to re-evaluate their earlier manpower requirements and attempt to lower them. Subsequently, the original number of required signalmen was reduced to 154.

29. During the period November, 1980, to April 1, 1981, the Cotton Belt made considerable efforts to find and hire qualified signalmen. The Cotton Belt contacted former Rock Island signal employees, furloughed employees from other railroads, technical schools, electronics companies, and colleges in an attempt to obtain the required number of signalmen. In addition, the Cotton Belt contacted all individuals who responded to an advertisement which the railroad requested that the BRS place in their *Signalmen's Journal*. Furthermore, the railroad worked closely with the state employment agencies in the State of Kansas in an effort to secure applicants for employment. The BRS has contended that efforts of the railroad were not effective because the Cotton Belt refused to pay any trans-

portation to work sites or living expenses for the duration of the rehabilitation work. Peifer indicated that the Cotton Belt was not willing to pay expenses and asserted that this was the general practice. The court heard no substantial evidence to the contrary and finds that the efforts of the railroad were extensive and reasonable under the circumstances that they faced.

30. Despite the diligent efforts of the Cotton Belt in attempting to obtain additional signalmen, they were only able to initially hire 21 signalmen and 48 assistant signalmen. After it became clear that the Cotton Belt would not be able to hire the number of signal employees required to complete the 1981 project, Peifer again contacted the engineering department and asked them to revise the force projections utilizing the same concept that was used in the 1980 project, that of maximizing the number of assistant signalmen which could be used on the project. Thereafter, the engineering department revised its estimate and came up with 84 as the bare minimum number for signal employees.

31. On March 4, 1981, the Cotton Belt and the BRS entered into an agreement covering the 1981 rehabilitation project. Consistent with the 1980 project agreement, the Cotton Belt agreed to utilize former Rock Island employees and new hires to fill the signalmen positions established for the 1981 project. Furthermore, the 1981 rehabilitation agreement covered several other subjects such as: relaxing the starting time rule in order to provide additional flexibility; giving the railroad the right to establish signal gangs working fourteen consecutive days;

continuing the arrangement of maximizing assistant signalmen positions; utilization of special equipment and the plowing of signal cables by work trains. The agreement contained no restriction prohibiting the use of an outside contractor by the railroad. The agreement concluded as follows:

> This Agreement is to cover this particular project, does not establish a precedent, and will not be referred to by either party in any other case.

32. On January 2, 1981, the BRS served a notice pursuant to Section 6 of the Railway Labor Act indicating its desire to revise, amend and supplement the existing collective bargaining agreement in various ways. One such change included a complete revision of the scope rule of the existing bargaining agreement. The railroad believed that the union's scope rule proposal was so extensive that it invaded the work jurisdictions of other railway labor organizations.

33. On February 26, 1981, the railroad served a list of counterproposals upon the BRS to be handled concurrently in the negotiations with the signalmen's Section 6 notice. The first of the items served by the Cotton Belt was a counterproposal to the revised scope rule proposed by the BRS. This counterproposal stated that the following "Note" would be added to the existing scope rule:

> Note: When it deems necessary, the Company shall have the right to subcontract work set forth in this Scope Rule. As the Company decides that it is necessary to subcontract work of the type set forth in the Scope Rule, it shall give the General Chairman advance notice of intent, except in the case of minor transactions.

The intended purpose of this counterproposal was to codify the discretionary right which the Cotton Belt had to employ outside contractors and the actual practice of having used outside contractors in the past. Furthermore, the railroad intended to use this counterproposal as a bargaining device in the negotiations that would arise under the Section 6 notice.

34. Meetings and negotiations have occurred over the union's Section 6 notice but no agreement has been reached. The negotiations are currently in a recessed status.

35. Subsequently, because of the inability to hire sufficient signalmen and the need to quickly complete the centralized traffic control system between Herington and Topeka, the plaintiff decided to use an outside contractor to perform limited portions of the installation work. The plaintiff invited contractors to bid for that work and the successful bidder was Serrmi Corporation of Atlanta, Georgia.

36. The work to be performed by Serrmi Corporation constituted only a small portion of the rehabilitation and upgrading of the signal system between Herington and Topeka. The entire project will cost $7,227,385.00. Serrmi Corporation has agreed to perform its work for a cost of $336,960.00.

37. Late in May, 1981, R. T. Bates, President of BRS, learned that the Cotton Belt was going to use an outside contractor to perform a portion of the signal work on the Tucumcari line. Bates called the Cotton Belt to confirm the letting of the contract.

38. On June 22, 1981, John Bass, Vice President of BRS, and Peifer discussed the plaintiff's use of Serrmi Corporation. Bass expressed his objection to utilization of Serrmi and indicated that the BRS would be taking a strike vote to determine whether or not its members desired to strike over the use of Serrmi.

39. On June 24, 1981, Peifer received a call from Bass who advised him that the BRS intended to strike if the Cotton Belt continued with its plans to use Serrmi Corporation to perform a portion of the centralized traffic control system.

40. On July 1, 1981, Peifer and W. C. Hoenig, Vice President of the St. Louis Southwestern Railway Company, telephoned Bass to determine if the BRS still intended to strike if the Cotton Belt used Serrmi Corporation on the Tucumcari line. Peifer suggested that they attempt to work something out. Peifer recommended that the union allow them to use the outside contractor and then agree that it would not be used as precedent in future cases. The BRS was not satisfied with this procedure although the union had agreed to a similar procedure in the March 4, 1981 agreement. The BRS said nothing could be done and indicated that they were ready to strike.

41. Serrmi Corporation was to begin work on July 6, 1981. On July 3, 1981, plaintiff brought the instant action to prevent the threatened strike by the BRS.

42. A strike would have a severe adverse impact on the Cotton Belt's efforts to rehabilitate and modernize the Tucumcari line and possibly place the plaintiff in default on its contractual commitments to the FRA. In addition,

a service interruption at this time, due to a strike, would seriously set back the considerable efforts made by the Cotton Belt to recapture traffic for the line. Furthermore, a strike would have an adverse impact on the public by interrupting the flow of interstate commerce. The stoppage of plaintiff's operations will cause immediate, serious and irreparable damage to plaintiff, plaintiff's employees, and the public at large.

43. No employee of the Cotton Belt will be laid off or otherwise adversely affected by the utilization of Serrmi Corporation to perform certain signal work on the Tucumcari line. No signal employees of the Cotton Belt are currently laid off. Even with Serrmi performing this work, additional signalmen are required to complete the 1981 rehabilitation project of the Tucumcari line.

CONCLUSIONS OF LAW

Based upon the foregoing facts, each party has taken a different position in this matter. Plaintiff contends that based upon the past practice of contracting out of signal work and the absence of any prohibition in collective bargaining agreement, it has the right to utilize outside contractors under the circumstances of this case. Plaintiff contends that a "minor dispute" is present under the provisions of the Railway Labor Act and that the defendants are therefore barred from engaging in a strike. Plaintiff seeks injunctive relief preventing the defendants from engaging in a strike over the plaintiff's use of an outside contractor to perform certain signal work on the recently acquired Tucumcari line.

Defendants assert that the plaintiff has unilaterally changed the working conditions of its signalmen, conditions which they allege have been in effect for decades, in violation of the procedures prescribed by the Railway Labor Act. Therefore, defendants contend that a "major dispute" exists under the provisions of the Railway Labor Act. They assert that the plaintiff recognized this fact by the service of a notice under Section 6 of the Act to allow it to subcontract signal work to outside contractors. Defendants believe that this case is controlled by *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union,* 396 U.S. 142 (1969). Defendants seek injunctive relief to prevent the plaintiff from contracting out or performing any signal work on its lines with outside contractors.

The court is faced with essentially three questions in this matter. First, is the instant controversy a "major" or "minor" dispute under the provisions of the Railway Labor Act? Second, does the court have jurisdiction to issue an injunction at this stage of the controversy? Finally, if so, should the court issue an injunction in this matter?

With regard to the first question, the starting point for this court is the classic definition of major and minor disputes set forth by the United States Supreme Court in *Elgin, Joliet, and Elgin Railway Co. v. Burley,* 325 U.S. 711, 723 (1945):

> The first [major disputes] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing

agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class [minor disputes], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. *The dispute relates either to the meaning or proper application or a particular provision with reference to a specific situation or to an omitted case.* In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. *In either case the claim is to rights accrued, not merely to have new ones created for the future.* (emphasis added.)

The court in *Westchester Lodge 2186 v. Railway Express Agency, Inc.*, 329 F.2d 748, 752 (2d Cir. 1964), explained the problem faced by this court in determining whether a controversy is a major or minor dispute:

Distinguishing between a minor dispute (interpretation and application of an existing agreement) and a major dispute (formation or alteration of an agreement) can sometimes be quite difficult, for there are areas in which the line seems rather indistinct. Agreements are ofttimes (sic) changed as much by interpretation as by the substitution of new agreements. As Judge Waterman observed for this court in Rutland Railway Corp. v. Brotherhood of Locomotive Engineers, supra, "the difference, on the one hand, between the interpretation and the application of an existing agreement, and, on the other hand, a change in an original intended basis of agreement is often a question of degree." 307 F.2d at 33.

The importance in the distinction between major and minor disputes lies in the procedures prescribed by the Railway Labor Act for the resolution of these disputes. In *Ashley, Drew & Northern Railway Co. v. United Transportation Union*, 625 F.2d 1357, 1368 (8th Cir. 1980), the court explained the procedures that must be followed under the Railway Labor Act:

> The first step toward settlement of either kind of dispute is negotiation and conference between the parties. Thereafter, procedures for major and minor disputes diverge. In a major dispute, either party may invoke the conciliation process administered by the National Mediation Board. If mediation fails and if the parties do not agree to binding arbitration, then either party may resort to unilateral action unless the Mediation Board and the President of the United States decide the dispute should be made subject to the investigation of an emergency board. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378, 89 S.Ct. 1109, 1115, 22 L.Ed.2d 344 (1969). In a minor dispute, completion of the negotiation and conference step permits either party to invoke the arbitration of the National Railroad Adjustment Board, whose decision is "final and binding" 45 U.S.C. § 153 (First) (m). *See Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad, supra*, 353 U.S. at 33-34, 77 S.Ct. at 636-637.

Courts have generally held that a dispute is minor as long as the position of one of the parties is "arguably" justified by the terms of the collective bargaining agreement or, in somewhat different statement, if the contention that the agreement sanctions the disputed action is not

"obviously insubstantial." In *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443 (9th Cir. 1968), the court stated:

> It is true, as the union points out, that a controversy, although couched in terms of a disagreement as to interpretation of a contract, may under some circumstances be regarded as a major dispute. This result may be reached if it can be said that the change being imposed by one side on the other is in nowise contemplated or arguably covered by the agreement. The provisions of the Railway Labor Act may not be avoided merely through the device of unilateral action which the actor purposefully intends shall not become a part of the agreement. The major-minor dispute dichotomy does not relate to artfully contrived formalistic demands or responses, but to matters of substance. United Industrial Workers of the Seafarers International Union v. Board of Trustees, 5 Cir., 351 F.2d 183, 188-189; Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers, 2 Cir., 307 F.2d 21, 33-34.
>
> *But where the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement, as illuminated by long-standing practices, the question of whether the position is well taken involves a minor dispute.* We think this is such a case. (emphasis added.)

See also St. Louis Southwestern Railway Co. v. United Transportation Union, ... F.2d ..... (5th Cir., 5/29/81); *International Brotherhood of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156 (D.C. Cir. 1972); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354 (8th Cir. 1972); *International Brotherhood of Teamsters v. Braniff International Airways, Inc.*, 437

F.2d 1272 (5th Cir. 1971); *Airline Stewards Assn. v. Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289 (1st Cir. 1969). Thus, a dispute is minor as long as a parties' position is "tenable," "not frivolous," or "arguably justified by the contract."

In accordance with the purposes of the Railway Labor Act of resolution of disputes through administrative rather than judicial channels, the court's scope of inquiry is quite narrow. It is not our function to construe or interpret the collective bargaining agreement and determine which of the positions of the parties is correct. Rather, the court simply acts as a "clearinghouse" by determining which administrative body should make the final classification. The court must only decide whether the disputed action by the plaintiff can be "arguably justified" by the existing collective bargaining agreement. *See Air Line Pilots Ass'n International v. Northwest Airlines, Inc.*, 444 F.Supp. 838, 840 (D. Minn. 1977); *Texas Pacific-Missouri Pacific Terminal Railroad v. Brotherhood of Railway and Steamship Clerks*, 232 F.Supp. 33, 36-37 (E.D. La. 1964). We believe that it can be.

As the findings of fact disclose, there has never been a prohibition in any of the collective bargaining agreements agreed to between the Cotton Belt and the BRS from contracting out signal work. The evidence also shows that the carrier has in the past utilized outside contractors when there was an insufficient supply of qualified signalmen available. We believe that under the circumstances of this case that the position of the plaintiff is arguably allowed by the existing collective bargaining agreement and the estab-

lished practices of the parties. In *United Transportation Union, Local Lodge No. 31 v. St. Paul Union Depot Co.*, 434 F.2d 220 (4th Cir. 1970) (per curiam), the court discussed the phrase "established practice." They stated:

> We think that an "established practice" under the Act was intended to include only prior conduct of the parties which has attained the dignity of a relationship understood by the parties to at least impliedly serve as if part of the collective bargaining agreement. . . . An "established practice" under the Act should demonstrate not only a pattern of conduct but also some kind of mutual understanding, either expressed or implied. Thus, prior behavior by itself, although similar to the acts in disputes, falls short of an "established practice." Whether prior conduct establishes a working practice under the Act depends upon consideration of the facts and circumstances of the particular case. Among the factors one might reasonably consider would be the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute.

434 F.2d at 222-23.

The court does not believe that an extended discussion of all the facts and circumstances of this case are necessary because, as pointed out previously in this opinion, it is not the function of this court to decide the merits of this controversy. Rather the court simply must determine if the plaintiff's position is "arguably" allowed by the bargaining agreement as illuminated by the "established practices" of

the parties to the agreement. We believe that it is and, therefore, find that a minor dispute is present under the facts of this case. *See Brotherhood of Locomotive Firemen and Enginemen v. N.Y., N.H., and H.R.R. Co.*, 296 F.Supp. 1044 (D. Conn. 1968) [held that when a party relies on custom or usage rather than on a specific provision in the agreement, the dispute is minor].

Furthermore, we find that the defendants' reliance upon *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union, supra,* is inapposite here. In *Shore Line,* for many years prior to 1961, railroad crews had reported for work and gone off duty at Lang Yard. If work had to be performed north of the Lang Yard, the railroad assumed the costs of the transportation to such outlying work and paid their wages from Lang Yard. Thus, as of February 21, 1961, the employees had the unwritten established right, as part of the status quo, to go on and off duty at Lang Yard, and be paid wages while deadheading north and returning to Lang Yard. On February 21, 1961, the railroad advised the union that it was establishing "outlying work assignments" at Trenton, Michigan, 35 miles north of Lang Yard.

The union responded with a Section 6 notice seeking to change the contract by prohibiting the carrier from moving an on-off duty point without negotiation. While the notice was pending, the carrier moved the on-off point to Trenton and the court issued an injunction restraining the carrier from making the change. It is essential to note that in *Shore Line* the carrier did not rely on a permissive provision in any contract, or analogous past practices, but

relied solely upon the absence of any contractual provision prohibiting the change. The Supreme Court affirmed the injunction, ruling that the status quo included working conditions not expressed in writing, and rejected the carrier's argument that it could make the change because nothing in the contract prohibited the change. Thus, the carrier in *Shore Line* was admittedly changing a working condition and did not rely (as does Cotton Belt herein) on any written contract, rule or past practices which arguably allowed it to change the on-off duty point. *Shore Line* thus was clearly a major dispute case because there was no written rules, contract or past practices arguably allowing the carrier to take the action it took. In fact, the past practices in *Shore Line* were totally inconsistent with the carrier's action in moving the on-off duty point.

The facts of *Shore Line* are far different from those of the case at hand. Here, the BRS claims that contracting violates the unwritten status quo. However, that argument must fail because the BRS cites no evidence to establish that the status quo, prior to July 3, 1981, included the right of the BRS to prohibit the Cotton Belt from contracting out work when it did not have sufficient signalmen of its own to perform the work. In fact, from 1940 to 1945, the Cotton Belt did contract out work. Since 1946, some limited contract work has occurred. Thus, the status quo arguably includes the right to contract. Because the BRS has never previously prevented the Cotton Belt from contracting when necessary to do so, the employees have not established a right to prohibit contracting. This is far different from *Shore Line* where for many years the em-

ployees had established the right to go on duty at Lang Yard and be transported free, while being paid, to points north like Trenton Yard.

In addition, we do not believe that the counterproposals served by the Cotton Belt in response to the union's January 2, 1981, Section 6 notice changes this dispute over contracting out into a major dispute. Nor do we believe that the carrier's counterproposals served in 1963 regarding contracting out preclude a finding that a minor dispute is present here. As disclosed by the findings of fact, the Cotton Belt's counterproposals were simply efforts to obtain specific language codifying its claimed right to contract out work. The counterproposals do not establish that the status quo existing as of July 3, 1981, included a specific prohibition against contracting out.

It is well established that where courts have found that a minor dispute is present, the mere service of a Section 6 notice does not create a major dispute nor does it prevent the carrier from proceeding under its own unilateral interpretation of the agreement or past practices. *United Transportation Union Local Lodge No. 31 v. St. Paul Union Depot, supra; Baker v. United Transportation Union*, 455 F.2d 149 (3rd Cir. 1971); *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2nd Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Hilbert v. Pennsylvania Railroad Company*, 290 F.2d 881 (7th Cir. 1961), *cert. denied*, 368 U.S. 900 (1961). Moreover, simply because a carrier originally treats a dispute as major dispute does not preclude a later judicial finding that the dispute is a minor one. *See St. Louis Southwestern*

Railway Co. v. United Transportation Union, supra; Delaware & Hudson Railway v. United Transportation Union, 461 F.2d 671 (2d Cir. 1972).

In the instant case, the collective bargaining agreement and past practices arguably allow contracting out or are at least reasonably susceptible to the plaintiff's contention. Accordingly, the court finds that this is a minor dispute and the service of the counterproposals to the union's Section 6 notice does not change the dispute into a major one.

Having determined that the dispute in this case is minor, the court must now consider whether it has the authority to issue an injunction under the circumstances of this case. Neither party to this action has sought to submit this matter to the Railroad Adjustment Board. Therefore, the question arises whether this court has the authority to issue an injunction where the dispute has not been submitted to the Railroad Adjustment Board. In *Itasca Lodge 2029 v. Railway Express Agency, Inc.,* 391 F.2d 657, 665-66 (8th Cir. 1968), the court discussed this issue in detail:

> However, does the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 preclude the jurisdiction of the District Court to issue an injunction in a "minor dispute" before the matter is submitted to the Railroad Adjustment Board? In Rutland, supra, 307 F.2d at p. 32, f.n. 7 Judge Waterman noted that there is some doubt as to whether a federal court had such power. The doubt stems from the decision of the Supreme Court in Manion v. Kansas City Terminal Railway Co., 353 U.S. 927, 77 S.Ct. 706, 1 L.Ed.2d 722 (1957), which in a per curiam opinion vacated a judgment of the Kansas City Court of Appeals that had affirmed a State circuit court's issuance of an injunction to prevent the

union from striking over disputed time claims. The Kansas City Court of Appeals found the disputes to be "minor" in nature, and upheld the injunction on general equity principles. The Supreme Court remanded for proceedings not inconsistent with the Court's decision in Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957) and " • • • without prejudice to the power of the Court of Appeals to reinstate its judgment if the dispute is submitted to the Adjustment Board by either party within a reasonable time."

In *Chicago River*, supra, the stated issue was " • • • whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board." 353 U.S. at 31, 77 S.Ct. at 636. The Supreme Court found that the Norris-LaGuardia Act and the the specific provisions of the Railway Labor Act take Railway Labor Act must be accommodated, but that precedence over the more general provisions of the Norris-LaGuardia Act. 353 U.S. at 40-42, 77 S.Ct. 635. The Norris-LaGuardia Act was held not to be a bar to an injunction issued to prevent a strike which would defeat the jurisdiction of the Adjustment Board, a Board expressly created by Congress to provide for compulsory arbitration of "minor disputes".

Some courts have read the *Manion* and *Chicago River* cases as standing for the proposition that if a "minor dispute" is not actually pending before the Adjustment Board, then no injunction can be issued pertaining to that dispute. E.g., Butte, Anaconda & Pacific Railway Company v. Brotherhood of Locomotive Firemen and Enginemen, 268 F.2d 54 (9th Cir. 1959) at p. 60, f.n. 10. (*Butte*, however, was concerned with a "major dispute"); see *Rutland*, supra, f.n. 7, p. 32 of

> 307 F.2d. *We believe such a reading is too restrictive in that it would, in given situations, render the courts powerless to give effect to purposes of the Railway Labor Act.* (emphasis added.)

We agree with the above conclusion reached in *Itasca.* We do not believe that the failure of the parties to submit the matter to the Railroad Adjustment Board prevents this court from providing injunctive relief in this matter. *Accord, Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, International,* 416 F.2d 633 (4th Cir. 1969); *Westchester Lodge 2186 v. Railway Express Agency, Inc., supra; Long Island Railroad Co. v. Brotherhood of Locomotive Engineers,* 290 F.Supp. 100 (E.D.N.Y. 1968); *Pennsylvania Railroad Co. v. Transport Workers Union of America,* 265 F.Supp. 685 (E.D.Penn. 1967); *Texas Pacific-Missouri Pacific Terminal Railroad v. Brotherhood of Railway and Steamship Clerks, supra.* However, if we should decide to provide injunctive relief in this matter, we shall require the parties to take the appropriate steps to submit this dispute to the Railroad Adjustment Board within thirty days in order to decide this controversy as quickly as possible. *See Itasca Lodge 2029 v. Railway Express Agency, Inc., supra; Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, International, supra; Long Island Rail Road Co. v. Brotherhood of Locomotive Engineers, supra.*

Finally the court must determine if a preliminary injunction should issue. In order for the court to grant an injunction, a party must show a substantial likelihood of success on the merits; irreparable harm absent issuance of the injunction; proof that the threatened injury outweighs whatever damage the proposed injunction may cause the

opposing party; and that the issuance of an injunction would not be adverse to the public interest. *Lundgrin v. Claytor,* 619 F.2d 54, 63 (10th Cir. 1980).

The probability of success is interrelated with the major-minor dispute discussion. Since the court has determined that this controversy is a minor dispute, then the defendant has failed to sufficiently show that an injunction should be entered on their behalf to prevent the plaintiff's use of Serrmi Corporation. The court has held that this is a minor dispute because the collective bargaining agreement arguably justifies the carrier's position. Therefore, the court finds that the railroad has made a sufficient showing of success on the merits.

Further inquiry must focus on the equitable considerations which form the remaining requirements for the issuance of an injunction. The findings of fact clearly disclose that a strike would have serious effects on the plaintiff's business. Without a doubt, the court concludes that the plaintiff would be subjected to irreparable harm. Furthermore, we believe the threatened injury to the plaintiff clearly outweighs whatever damage the proposed injunction would cause the opposing party. The record is clear that none of the jobs of the signalmen are endangered by the use of Serrmi Corporation. In fact, the railroad continues to need additional signalmen in spite (sic) of their use of an outside contractor. In addition, the court finds that the issuance of an injunction in the plaintiff's favor would not be adverse to the public interest but rather would be to its benefit. An injunction preventing the union from striking would allow the railroad to proceed with its servicing of the public.

The court believes that the railroad made substantial and reasonable efforts to obtain signalmen before they hired Serrmi Corporation. We find that the railroad's position is arguably justified by the collective bargaining agreement and that the equities in this case clearly weigh in their favor. Therefore, the court shall grant plaintiff's motion for a preliminary injunction and deny defendant's similar motion.

IT IS THEREFORE ORDERED that plaintiff's motion for a preliminary injunction be and is hereby granted. However, the court shall require the parties to take the appropriate steps to submit this dispute to the Railroad Adjustment Board within thirty days of the date of this order. If this matter is not submitted to the Board within thirty days, the court shall dissolve the injunction. The security bond posted by the plaintiff for the temporary restraining order shall be continued.

IT IS FURTHER ORDERED that defendants' motion for a preliminary injunction be and is hereby denied.

IT IS FURTHER ORDERED that the defendants and all persons in active concert and participation with them, and all persons acting by, with, through or under them or by their order, be and they are hereby enjoined until further order of this court from:

(1) threatening, calling, instigating, authorizing, encouraging, participating in, approving or continuing a strike or work stoppage against the plaintiff and all acts in furtherance or in support thereof because of a

dispute over the use of an outside contractor to perform work involved with the rehabilitation and modernization of plaintiff's railroad signal system;

(2) picketing or bannering the premises on which plaintiffs conduct their operations, including the entrances and any other places where said premises are situated, from interfering with ingress to or egress from said premises, including the delivery, unloading, loading, dispatch and movement of plaintiff's rolling stock and equipment and the contents thereof, or from loitering or congregating at or near any approaches thereto, and upon any public street or highway leading to or from any place which employees of plaintiff or those having business with the plaintiff desire to enter to leave enroute to or from said premises because of a dispute over the use of an outside contractor to perform work involved with the rehabilitation and modernization of plaintiff's railroad signal system;

(3) slowing down or interfering with in any way or manner the orderly and prompt continuance of work in plaintiff's operations because of a dispute over the use of an outside contractor to perform work involved with the rehabilitation and modernization of plaintiff's railroad signal system; and

(4) in any way carrying out or effectuating or conspiring to carry out or effectuate the activities enjoined in subdivisions (1), (2), and (3) hereof.

IT IS FURTHER ORDERED that said defendants and each of them take all steps within their power to terminate, avert and prevent the strike and the continuance of the strike.

IT IS SO ORDERED.

Dated this 23rd day of July, 1981, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

Appendix C

United States Court of Appeals
For the Tenth Circuit

November Term—December 1, 1981

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, and Honorable James K. Logan, Circuit Judges

No. 81-1943
(D.C. No. 81-4143)

St. Louis Southwestern Railway Company,
Plaintiff-Appellee,

vs.

Brotherhood of Railroad Signalmen; Pacific Southwest General Committee: R. T. Bates, G. G. Ruhl, J. T. Bass, K. D. Raney, O. C. Lewis,
Defendants-Appellants.

[Filed Dec. 28, 1981]

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of this Court.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

Appendix D

Attachment No. 2

1. Modernization of Agreements to Meet Changing Conditions

(a) Eliminate all agreements, rules, regulations, interpretations and practices, however established, which in any way handicap or interfere with the carrier's right to:

(1) Transfer work, either permanently or temporarily, from one facility, location, territory or department* to another facility, location, territory or department*;

(2) Contract out work;

(3) Lease or purchase equipment or component parts thereof, the installation, operation, maintenance or repairing of which is to be performed by other than employees of the carrier;

(4) Trade in and repurchase equipment or exchange units;

(5) Make effective any other changes in work assignments or operation.

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*This will permit the inclusion or exclusion of work that is now included within the scope of existing agreements.

(b) Whenever the introduction of a change in methods or operation such as those set forth in paragraph (a) hereof cannot be accomplished, or where its benefits could not be fully realized, without the consolidation, merger or elimination of one or more seniority districts, or in any other instances where a carrier desires to consolidate,

merge or eliminate one or more seniority districts, the carrier shall give 30 days' notice to the affected organization or organizations. All parties affected by the change shall, before expiration of the notice period, engage in joint negotiations in regard to the consolidation, merging or elimination of one or more seniority districts. If agreement has not been reached within 30 days of the date of the notice, any party may submit the question for final and binding determination to an arbitration board consisting of a representative of each organization involved, an equal number of carrier representatives and a neutral member selected by the participating members. Should the parties fail to agree upon the selection of a neutral within 10 days from the date of the service of such notice, the parties, or any party, to the dispute may certify that fact to the National Mediation Board, which Board shall, within 10 days from the receipt of such certificate, name a neutral. If the parties to the dispute fail to agree upon the fee to be paid to the neutral, the National Mediation Board shall stipulate the amount of such fee. The arbitration board shall begin hearings within 10 days of the appointment of the neutral. Findings shall be rendered in writing by the arbitration board within 30 days from the date of the beginning of the hearings of the particular dispute, such findings to be final and binding upon all the parties to the dispute, whether or not such parties appear before the arbitration board. The arbitration board shall not undertake to determine whether the change is to be introduced but shall confine its decision to the consolidation, merger or elimination of seniority districts. The arbitration award thus rendered may be made effective 30 days after the date

of such award or at a later date if the carrier, for operational or other reasons, so decides.

(c) (1) Where an agreement, rule, regulation, interpretation or practice, however established, exists which is more favorable to the carrier, such agreement, rule, regulation, interpretation or practice may be retained.

(2) Where no agreement, rule, regulation, interpretation or practice exists which imposes the limitation or restrictions which would be eliminated by this proposal, the fact that the subject matter is included in this uniform Attachment A is not to be construed as an admission that such limitation or restriction exists on this carrier.

2. Compulsory Retirement

All employees subject to the provisions of this agreement who are 70 years of age or over must retire from active service no later than 90 days subsequent to the effective date of this agreement. Thereafter the mandatory retirement age shall be progressively lowered until it is 65 in accordance with the following schedule:

January 1, 1964—69 years of age
January 1, 1965—68 years of age
January 1, 1966—67 years of age
January 1, 1967—66 years of age
January 1, 1968—65 years of age

Existing agreements which provide for retirement at an earlier age than herein set forth remain in full force and effect.

Appendix E

Appendix B

Article I—Stabilization of Employment

Section 1. The number of employes in each of the occupational classifications as of May 31, 1963, covered by the agreement between the carrier and the organization shall not be reduced for any reason excepting through normal attrition, and such reduction shall not exceed 2% per year.

Section 2. The carrier shall give not less than ninety days' notice to the organization of any change in equipment, methods, location of work or any other change that will affect an employe and said notice shall include detailed information as to changes in assignments and positions to be affected.

Section 3. None of the work of the carrier now being performed, or susceptible of being performed, by employes coming within the scope of the agreement between the carrier and the organization, will be contracted out or otherwise transferred to other establishments or employers, and no existing arrangement under which such work is now being performed by other establishments or employers shall be continued, excepting upon agreement between the carrier and the duly authorized representative of the organization.

Section 4. Any employe adversely affected by abolition of any position or by any change in technology, organization, volume or consist of traffic, or in location of work or employment, including contracting out or other transfer of work to other establishments or employers (as agreed upon pursuant to Section 3) shall be made whole

for any and all adverse effects, financial or otherwise, to himself or his family.

Section 5. Any employe who, as a result of any of the types of changes referred to in Section 4, would be required to transfer to another position or location, and who may elect in lieu of such transfer to resign or retire, shall be considered to be made whole either by payment of a severance allowance in the amount provided for in Section 9 of the Agreement, May, 1936, Washington, D. C., or in the event of early retirement under the Railroad Retirement Act, by payment of a supplementary retirement allowance sufficient to compensate for immediate reduction of income and subsequent reduction in retirement annuity under the Railroad Retirement Act, due to such early retirement.

Section 6. Resignation or early retirement, brought about by the circumstances set forth in Section 5 above, shall not be considered as normal attrition for the purpose of this agreement.

Appendix F

Section 2 of the Railway Labor Act, 45 U.S.C. § 152 (1934) provides as follows:

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representa-

tives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any persons seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the

contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may

be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State,

any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which

shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an

employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) (1934) provides as follows:

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Section 6 of the Railway Labor Act, 45 U.S.C. § 156 (1934) provides as follows:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended

change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Opposition

Supreme Court, U.S.
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No. 81-1612

In the Supreme Court of the United States

October Term, 1981

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

BROTHERHOOD OF RAILROAD SIGNALMEN, PACIFIC SOUTHWEST GENERAL COMMITTEE, R.T. BATES, G.G. RUHL, J.T. BASS, K.D. RANEY, O.C. LEWIS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a railroad violates the Railway Labor Act by unilaterally contracting out signal work when the bargaining agreement is silent on the subject, the carrier has served a Section 6 notice upon the union representing signal employees to amend the contract to include the right to contract out signal work, and the railroad has a long established practice of using its own employees to perform the work being contracted out.

PARTIES INVOLVED

Respondents are the bargaining representatives for the craft of railroad signalmen employed by petitioner St. Louis Southwestern Railway Company, or officers of either respondent Brotherhood of Railroad Signalmen or Pacific Southwest General Committee.

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No. 81-1612

In the Supreme Court of the United States

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
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BROTHERHOOD OF RAILROAD SIGNALMEN, PACIFIC SOUTHWEST GENERAL COMMITTEE, R.T. BATES, G.G. RUHL, J.T. BASS, K.D. RANEY, O.C. LEWIS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT

Respondent Brotherhood of Railroad Signalmen ("Signalmen's Union") was first recognized as bargaining representative for the craft of signalmen employed by petitioner St. Louis Southwestern Railway Company ("Cotton Belt") on September 5, 1940 (App. at 6).[1] Shortly before recognizing the Signalmen's Union as bargaining representative, Cotton Belt began hiring qualified signalmen from other railroads. Since trained signalmen were in short supply during World War II, Cotton Belt did not have a sufficient work force of qualified signalmen until after the conclusion

1. References are to the Appendix attached to the Petition.

of that conflict. Therefore, during World War II, Cotton Belt used the employees of manufacturers of signal equipment to install certain signal systems (App. at 8).

Since the completion of those installations in 1945, Cotton Belt has performed maintenance, wiring and installation of signal equipment and signal systems with its own signal forces. In addition, the bargaining agreements since that time have contained a scope rule clearly defining the work that belongs to the employees represented by the Signalmen's Union. The October 1, 1970 contract states:

> "This agreement shall apply to work or service performed by the employees herein in the Signal Department, and governs the rates of pay, hours of service and working conditions of all employees covered by Article I, engaged in the construction, reconstruction, installation, maintenance, testing, inspecting and repair of wayside signals, pole line signal circuits and their appurtenances, interlocking spring switch locking devices, highway crossing protection devices and their appurtenances, wayside train stop and train control equipment, detector devices connected with signal systems, including centralized traffic control systems, car retarder systems and hot box detectors and car counting devices when used in connection therewith, dragging equipment detector devices, electric switch lamps, and all other work generally recognized as signal work performed in the field or signal shops. . . ."

In fact, since 1945, Cotton Belt has hired and maintained a force of sufficient signalmen capable of performing that work (App. at 10-11).

In 1963 and at diverse times thereafter, however, Cotton Belt served bargaining notices upon the Signalmen's Union to obtain the right to contract out signal work with-

out prior agreement of the union. On each occasion, the notice has been withdrawn by the railroad as part of the labor contract reached by the parties (App. at 33).

On March 4, 1980, in contemplation of the restructuring of the Midwest rail system caused by the bankruptcy of the Rock Island and Chicago, Milwaukee, St. Paul and Pacific Railroad, and of the acquisition of certain of those rail lines by other rail carriers, Cotton Belt and other railroads and the Signalmen's Union and other railway labor organizations entered into an agreement to provide a fair and complete arrangement for the protection of the employees of the bankrupt railroads. In part, the March 4, 1980 agreement provided that "contracting (pursuant to existing agreements) in special rehabilitation projects will be subject to negotiations between individual purchasing carriers and interested employee representatives." (App. at 35). On June 6, 1980, the Interstate Commerce Commission authorized Cotton Belt's purchase of the railroad line between Santa Rosa, New Mexico and St. Louis, Missouri of the bankrupt Chicago, Rock Island & Pacific Railroad Company ("Rock Island"), which Cotton Belt acquired on October 30, 1980 (App. at 33).

In accordance with this provision in the March 4, 1980 agreement, on September 16, 1980, Cotton Belt proposed that the Signalmen's Union enter into an agreement for the rehabilitation projects to take place on the Tucumcari Line of the Rock Island. In recognition of the practice barring the use of outside contractors to perform signal work, the agreement proposed by Cotton Belt provided that "contractor's forces may be used" to begin the project in 1980 and that "the subject of selection of forces and the use of contractor's forces will be the subject of an agreement covering the 1981 phase of the Rehabilitation Project." (App. at 36). This proposal was rejected by the Signal-

men's Union. On September 16, 1980 the parties entered into an agreement that did not permit the use of contractor forces (App. at 37-38).

Again recognizing the established work practice relative to contracting out signal work, Cotton Belt on February 26, 1981, served a notice under Section 6 of the Railway Labor Act upon the Signalmen's Union. The notice would include as a note to the scope rule in the collective agreement the following provision:

> "When it deems necessary, the Company shall have the right to subcontract work set forth in this Scope Rule. As the Company decides that it is necessary to subcontract work of the type set forth in the Scope Rule, it shall give the General Chairman advance notice of intent, except in the case of minor transactions."

The Cotton Belt's notice is the subject of current wage and rule negotiations between the parties (App. at 13).

Although hundreds of signal employees from the bankrupt carrier and other railroads, including Cotton Belt's parent, were out of work, Cotton Belt only hired 69 signal employees from the involved operating districts of the Rock Island and from the Southern Pacific to meet the estimated 84 employees needed on the project. It would offer only temporary employment to employees from other areas of the Rock Island and from the Milwaukee Railroad and to furloughed employees from other rail carriers. It refused to pay them any transportation to work sites or their living expenses during the duration of the rehabilitation work. Some signalmen, who applied for work and were willing to accept a job on this basis, were told that Cotton Belt would contact them. It never did. And, though some signal construction work involves casual

labor, Cotton Belt refused to hire available workmen in the local work area for those jobs (App. at 40-41).

In June 1980, the Signalmen's Union discovered that the carrier intended to contract out a portion of the signal work involved in the construction of a centralized traffic control system between Topeka and Herington, Kansas to the Serrmi Corporation.[2] Accordingly, it threatened to strike. Cotton Belt sought a strike injunction, and the Signalmen's Union filed a counterclaim in which it requested an order barring the contracting out of signal work until completion of the "major dispute" procedures contained in the Railway Labor Act, which had been invoked by the Cotton Belt and are discussed in *Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369 at 378 (1969).

On the basis that the bargaining agreement did not contain a prohibition against contracting out signal work and the work had been contracted out between 1940 and 1945, though not thereafter, the district court found that the dispute was a minor one. On December 1, 1981, the Court of Appeals for the Tenth Circuit reversed and remanded. In holding the dispute was major, the court said:

> "The dispute involves an attempt to insert a new provision, and one of high importance which goes to

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2. Serrmi was to receive $336,900 for the work to be performed by it, and its contract was to be completed by January or February 1982, according to Cotton Belt's testimony in the district court. Cotton Belt continued to use Serrmi until the district court vacated its judgment on December 28, 1981. The Signalmen's Union then discovered that Cotton Belt was contracting out signal work with other contractors, which contracting out was restrained by the district court on January 7, 1982. Those issues were resolved by the parties in an agreement dated January 27, 1982. Thus, the project on the Tucumcari line continues; the signal work is being performed; and the rehabilitation is almost completed. From a practical view, the specific matter before the Court bears little significance at this point of time.

the heart of the employment, namely job security. This shows that a new provision is necessary to the change." (App. at 24.)

The court of appeals also noted that evidence to establish the railroad's contention that its right to hire a contractor "has taken form and effect as an implied right . . . is practically nonexistent." (App. at 26). Accordingly, it found an "almost complete dearth of evidence in support of the trial court's determination herein that the case involves a minor and not a major dispute." (App. at 27).

REASONS FOR DENYING THE WRIT

This case involves no question of law that is novel or worthy of review, but only the question of whether the court of appeals correctly canvassed the record in a suit brought by a railroad to prevent a union from striking and in which the union filed a counterclaim to restrain the railroad from unilaterally contracting out work that had not been performed by the employees of outside contractors since World War II, while the parties are negotiating upon the railroad's bargaining notice to attain the right to contract out. The court of appeals held that the facts of the case established that the dispute between the parties was a major one involving an attempt by the railroad to insert a new provision in the collective bargaining agreement. Finding a "dearth of evidence" supporting the district court's view that the dispute was minor, the court below had no doubt the dispute was major, going "to the heart of the employment, namely job security." (App. at 24, 27). Whether the court of appeals was right in that decision—and it clearly was—is not a question that deserves review by this Court.

Contrary to petitioner's assertions, the decision below is not in conflict with any decision of the other courts of appeals and presents no question under the Railway Labor Act which merits this Court's review. Moreover, the decision is consistent with the holdings of this Court and its reading of the Railway Labor Act.

I.

THE DECISION IS CONSISTENT WITH THE HOLDINGS OF THIS COURT

The first sentence of Section 6 of the Railway Labor Act, 45 U.S.C. § 156, provides that "carriers and representatives of the employees shall give at least thirty days' written notice of an *intended change* in agreements affecting rates of pay, rules, or working conditions." (Emphasis supplied). Recognizing that it did not have the right to contract out signal work, not having contracted out that work since 1945, Cotton Belt served a Section 6 notice on February 26, 1981, to allow it to do so. The following portion of the second sentence of Section 6 thereupon came into play:

> "*In every case where such notice of intended change has been given, or conferences are being held with reference thereto,* or the services of the Mediation Board have been requested by either party, or said Board has offered its services, rates of pay, rules, or *working conditions shall not be altered by the carrier until the controversy has been finally acted upon* . . . ." (Emphasis supplied.)

In *Detroit & Toledo S.L. R.R. v. United Transp. Union*, 396 U.S. 142 (1969), the railroad claimed that it had the unilateral right under the collective bargaining

agreement to establish outlying assignments, because the contract was silent on that subject. The carrier issued a bulletin creating disputed work assignments. The new assignments would have required the employees to report for work at a different point from where they had been reporting for many years. This reporting point was not mentioned in the agreement, but became an established practice through long, customary usage, a practice that could not be changed at the whim of management. *Id.*, at 143.

This Court held that the railroad's unilateral changes in reporting points and work assignments without first serving a Section 6 notice and thereafter exhausting the negotiation procedures of the Act violated Sections 2, Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, Seventh, and 156, and warranted dismissal of its complaint for a strike injunction and the grant of relief enjoining its unilateral action. In reaching this conclusion, the Court rejected the railroad's contention that the status quo which the Act requires be maintained consists only of the working conditions specifically covered in the current agreement between the carrier and union. Instead, what must be preserved as the status quo until the Act's procedures are invoked and exhausted "are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing agreement." *Ibid.*, 143.

The decision below conforms with the standards elaborated upon by the Court in the *Shore Line Case*. Cotton Belt invoked the Section 6 procedures for negotiation of a rule permitting it to contract out signal work. Since 1945, there has been a practice of using Cotton Belt employees to perform the signal work that the carrier unilaterally contracted out. The bargaining agreement is silent on the

subject of contracting out, although the work to be performed by the employees of outside contractors was specifically included within the scope rule designating the work of the craft of signalmen covered by the bargaining agreement between the Cotton Belt and Signalmen's Union. Just as the railroad in the *Shore Line Case* argued that the agreement's silence gave it the right to act unilaterally, both the district court and Cotton Belt sought to justify the position that Cotton Belt could unilaterally contract out work on the ground that "there has never been a prohibition in any of the collective bargaining agreements agreed to between the Cotton Belt and BRS from contracting out signal work." (App. at 30, 50). The court of appeals, however, correctly found this approach was much the same as that taken by the railroad in *Shore Line*, and should be rejected as an attempt by the railroad to change existing legal obligations going to the basic employment relationship without complying with the major disputes procedures set forth in the Railway Labor Act (App. at 21, 26).

The decision by the Tenth Circuit is also consistent with this Court's ruling in *Railway Telegraphers v. Chicago & Northwestern Ry. Co.*, 362 U.S. 300 (1960), a case involving the question whether Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104, deprived the federal courts of jurisdiction to enjoin a railway union's strike to force the carrier to bargain upon a Section 6 notice requesting a contract provision barring the abolition of jobs without the union's consent. The railroad had refused to negotiate on the ground that the issue was nonbargainable, because a state regulatory agency had permitted it to abandon the work locations where the jobs were to be removed. Finding the dispute related to a major change in the existing contract, rather than to a mere infraction or interpretation of that contract, the Court reversed the order granting the

strike injunction. In reply to the railroad's traditional approach that the controversy was, in fact, a minor one, this Court stated:

> ". . . [I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of that agreement." *Id.*, at 341.

Similarly, in the instant case, the court of appeals found that "the dispute involves an attempt to insert a new provision, and one of high importance which goes to the heart of the employment, namely job security." (App. at 24). This change also could not be related to a mere infraction or interpretation of the existing bargaining agreement. Consistent with the decisions of this Court, the court of appeals appropriately set aside the injunction issued by the district court.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner contends that the decision below conflicts with the decisions of the other circuits in two respects. It is incorrect on both contentions.

First, Cotton Belt asserts that the Tenth Circuit improperly applied the test by which the major-minor decision turns upon the court's overview as to whether existing contractual provisions "arguably" justify the carrier's unilateral action or, stated somewhat differently, whether the railroad's contention that its disputed changes in employment conditions were sanctioned by the effective collective bargaining agreement is not "obviously insubstantial." See

United Transp. Union, Local 1477 v. Baker, 482 F.2d 228, 230 (6th Cir. 1973). Since the written agreement is silent on the subject of contracting out, petitioner claims that this silence arguably supports its position that the unilateral change is sanctioned by the agreement. Upon its assessment of the entire record, however, the court of appeals did not believe that petitioner's claim had been substantiated adequately.

Notwithstanding the "arguable" or "reasonably susceptible" standard, all circuits have recognized that they must look at these cases "through ordinary glasses, not major or minor lenses, [so that] we can see this case for what it really is." *Industrial Workers, Seafarers Int'l v. Galveston Wharves*, 351 F.2d 183, 189 (5th Cir. 1965). In the cited case, the Fifth Circuit held, in a remarkably similar situation, that the lease and transfer of dock and elevator facilities resulting in the permanent layoff of employees was a major dispute. The union was awarded an injunction to restore the status quo existing before the lease. In *United Transp. Union, Local 63E v. Penn Central Co.*, 443 F.2d 131 (6th Cir. 1971), *cert. denied*, 404 U.S. 938, the Sixth Circuit approved the issuance of a temporary injunction maintaining the status quo in a controversy over a unilateral change in established working conditions involving the substitution of computer printouts for long used crewboards. That court subsequently reaffirmed the decision as being fully consistent with the "arguable" test in *United Transp. Union, Local 1477 v. Baker, supra*, 482 F.2d at 231, n.1. In sum, in order for there to be a minor dispute relating to changes that plausibly are permitted by the collective bargaining agreement, the railroad is required to advance substantive provisions in the current agreement upon which the court can find that the contract is reasonably susceptible of the contractual interpretation sought by the carrier, see *United Transp. Union v. Burlington Northern, Inc.*, 458 F.2d

354, 357 (8th Cir. 1972), or that there is an established practice arising from conduct over a period of years "with the knowledge and acquiescence of the parties to become in reality a part of the actual working conditions." See *United Transp. Union, Lodge 31 v. St. Paul Union Depot Co.*, 434 F.2d 220, 222 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (citing this Court's opinion in *Detroit & Toledo S.L. R.R. v. United Transp. Union, supra*, 396 U.S. at 154); *Baker v. United Transp. Union*, 455 F.2d 149, 156 (3rd Cir. 1971) (past activity of the railroad in the course of which the union "requires that the railroad act in concert with it in the exercise of such practice . . . does not become a prerogative to be exercised unilaterally by the railroad"); *Baker v. Railroad Yardmasters*, 347 F. Supp. 215 (E.D. Pa. 1972).

The court of appeals did not reject the holdings of any other circuit; rather its decision is consistent with these rulings. It found, and properly so, that Cotton Belt could not cite any substantive contractual provision supporting its position and that the facts did not establish any past practice justifying its unilateral conduct.

Second, petitioner claims that the lower court reached the above finding by improperly considering the railroad's service from time to time of bargaining demands to obtain this right and the union's refusal to agree to the demands as an admission that the existing agreement and past practices prohibit contracting (Petition 15). Not only does petitioner misread the opinion of the court of appeals, but it misconstrues the decisions of the other circuits.

As we have shown above, the court of appeals appropriately considered the carrier's efforts to obtain a change, the union's consistent refusals to acquiesce in that demand, the service of the pending notice in the context of the controversy between the parties, and the language of the notice

as factors in deciding whether the dispute was major or minor, that is, whether Cotton Belt was correct in its contention that the dispute was "arguably covered" by the silence of the bargaining agreement or that the established practice was "reasonably susceptible" of conferring upon it the right to contract out.

In this connection, petitioner misapprehends the opinion in *Carbone v. Meserve*, 64 F.2d 96 (1981), *cert. denied*, 50 U.S.L.W. 3248 (U.S. Oct. 6, 1981). The union claimed that the railroad had breached the bargaining agreement by withdrawing a complement of crew dispatchers and consolidating them with a crew at another terminal. Both the union and the railroad relied upon specific contractual provisions to support their positions. Looking at that language, the First Circuit found substantial merit to the carrier's reading of the provisions upon which it relied and held the dispute to be a minor one subject to arbitration. That situation is not present in this case.

In view of the express language involved, the court said that it could not draw any adverse inference from the carrier's withdrawal of a pending notice to eliminate the rule in its entirety. This observation is far removed from the position taken by petitioner, particularly when one reads the court's discussion following that comment. Citing the decision of the Seventh Circuit in *United Transp. Union v. Illinois Terminal Co.*, 471 F.2d 375, 378-380 (7th Cir. 1972), which conforms with the instant decision and holds that a dispute "characterized and treated by both parties as a major dispute" for years does not suddenly change its character by the railroad's change in position,[3]

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3. Neither the express language of the agreement nor past practice, when properly analyzed, demonstrated that the dispute was covered by the contract as the railroad claimed. *Id.*, at 381 (Stevens, *J.*, concurring).

the First Circuit pointed out that the determination of what is permissible under a contract provision is quite different from its elimination and, in the latter case, a different view could follow.

A full reading of *Delaware & Hudson Ry. Co. v. United Transp. Union*, 461 F.2d 671 (2d Cir. 1971), cited at page 16 of the petition, also fails to assist petitioner. The Second Circuit specifically states that the union's service of a Section 6 notice, the carrier's filing of a counterproposal under Section 6, and submission of the dispute for conferences before the Mediation Board created a major dispute, "thus prohibiting the issuance of any injunction" at that point. *Id.*, 672-673. Reviewing the record before it, the court said that the subsequent withdrawal of the carrier's counterproposal should not be a fact given "undue emphasis." *Id.*, at 673. Since both parties relied upon application of the language in the agreement to the dispute, a situation unlike elimination of the rule, the court held the dispute was a minor one. Clearly, that court, as the Tenth Circuit, properly believed that the bargaining demands and actions of the parties are not to be totally excluded from consideration in assigning a label to the dispute. Moreover, Cotton Belt has never withdrawn its notice in this case—a notice that the court of appeals found attempts to obtain a right that management did not have on this record.

In any manner viewed, the decision of the court of appeals does not conflict with any holding in any other circuit.

III.

THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT

The decision below enhances the functioning of the collective bargaining process rather than destroying it, as petitioner asserts (Petition 18-19). The prohibitions contained in Sections 2, Seventh and 6 of the Railway Labor Act against changes in the status quo while a Section 6 notice is pending are "central to (the Act's) design" and were purposely inserted to motivate both parties " 'to make every reasonable effort' to settle disputes without interruption to interstate commerce." *Detroit & Toledo S.L. R.R. v. United Transp. Union, supra,* 396 U.S. at 150, 151. In evaluating the checks-and-balances provided by the status quo obligations, this Court said:

> "Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce."

In fact, as previously noted, the decision of the court of appeals has motivated the parties to reach an accommoda-

tion permitting the completion of the rehabilitation project without interruption to commerce.

Arbitration or contract making by decision of a third party is, however, the antithesis of the collective bargaining process in which the parties freely reach a solution at the negotiating table. If the rationale advanced by petitioner, in fact, is the touchstone of the nation's labor policy, the concept of collective bargaining becomes an illusion. Under the standard advocated by petitioner, it would be impossible to ever find a major dispute. It would be a jewel buried in the minefield mentioned at page 18 of the petition and, therefore, could never be uncovered by anyone.

According to Cotton Belt, all railway labor disputes in which a railroad asserts that its position is only an interpretation or application of the agreement, whether its position is wrong on its face and whether the agreement is silent on the subject involved, should be directed to arbitration. It was never the intent of the Act to lead to that result. See *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-79 (1969). Posturing all disputes as minor ones as to which the carrier may make unilateral changes pending decision by an arbitrator tends to weigh disputes in favor of the railroad, which has no reason to be motivated to settle them. With the delays inherent in the railway arbitration process (see *Railroad Trainmen v. Central of Georgia Ry. Co.*, 415 F.2d 403, 416 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008), which delays have not significantly improved since the 1966 amendments, the very subtle and tenuous relationships between the parties that make collective bargaining work are destroyed. Employees will become frustrated with the process. The result only can lead to the unstable labor relations that existed in the railroad industry prior to the passage of the Railway Labor Act.

Thus, petitioner's claim that the result reached by the Tenth Circuit "could, as a practical matter, transform the bargaining and negotiation process mandated by the Act into a mine field" is based upon an erroneous view of the Act and of the appropriate fields for collective bargaining and for arbitration. Further, petitioner's assertions do not accurately describe the holding of the court of appeals. The court only held that the district court's determination that the dispute was minor was arbitrary and erroneous, because contracting out is a major condition of employment going to job security and there was a dearth of evidence to establish that the carrier had the right to contract out by reason of any provision contained in the agreement or by reason of an established practice. This determination involves a rather unique situation. Whether or not decided correctly—and respondents believe it was—the question is not one meriting this Court's attention.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

v.

BROTHERHOOD OF RAILROAD SIGNALMEN,
PACIFIC SOUTHWEST GENERAL COMMITTEE,
R. T. BATES, G. G. RUHL, J. T. BASS,
K. D. RANEY, O. C. LEWIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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* A list of petitioner's corporate subsidiaries and affiliates appeared on page (i) of the Petition for Certiorari.

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BROTHERHOOD OF RAILROAD SIGNALMEN, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONER

I. THE DECISION BELOW REFLECTS CONTINUING CONFUSION AMONG THE COURTS OF APPEALS AS TO THE PROPER LEGAL STANDARD FOR FINDING A "MAJOR" DISPUTE

In our Petition (at 8), we pointed out that the court below, by reaching its own interpretation of the agreement and determining the merits of the dispute, had disregarded the legal standard applied by the clear majority of the courts of appeals. Those courts have found a dispute "minor" and ordered arbitration except where the railroad's interpretation of an existing agreement was not "tenable" or "obviously insubstantial." (*See* Pet'n at 9.)

Respondents' Brief in Opposition adopts the same fallacious approach as the Tenth Circuit. Respondents seek to argue the merits of the underlying dispute, but fail to show that the court below applied the correct legal standard—a standard that calls for judicial restraint and sensitivity to the jurisdiction of the arbitration board established by Congress. As the Second Circuit has explained, courts "should not in the process of classifying this dispute as major or minor thereby also adjudicate the merits of the controversy between the parties." *Rut-*

land Railway Corp v. Brotherhood of Locomotive Engineers, 307 F.2d 21, 33 (2d Cir.), *cert. denied*, 372 U.S. 954 (1962).

Here, the railroad's interpretation of the contract was based on the absence of any language forbidding the "contracting out" of work and the existence of a past practice countenancing such management flexibility.[1] The district court entered a finding of fact that the labor agreement "contained no provision preventing the railroad from contracting out signal work" (Pet'n at A-30). As to past practice, it further expressly found (*id.* at A-32, 33):

> 10. During the years 1940 to 1945, Cotton Belt used outside contractors to perform certain signal work on its lines. During these years of World War II, qualified signalmen were in short supply and the Cotton Belt utilized outside contractors on several projects, including the installation of centralized traffic control systems in Missouri, Arkansas and Louisiana. The BRS made no complaint and filed no grievance regarding this work by outside contractors during this period.
>
> 11. Subsequent to 1945, the Cotton Belt did not contract out signal work but rather used its own signalmen to perform most of the signal work. However, on several occasions, the Cotton Belt was required by lessors of certain equipment to use the lessors' employees to operate the leased machines. The work performed by these individuals was work normally performed by signalmen. The BRS has voiced no objection to this procedure over the years. However, the BRS pointed out that a signalman is generally present during the operation of the machine and usually supervises the operation.

The court of appeals did not disagree with these findings. Indeed, it stated that "the trial court's findings of

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[1] As the court explained in *Rutland Railway*, "The scope of the management's prerogative is often not spelled out in collective bargaining agreements, but the prerogative exists implicitly to some extent in all such agreements." 307 F.2d at 35.

fact are accurate and are not disputed" (Pet'n at A-7). If the court had applied the right legal test, it would have stopped right there. With nothing in the agreement to prohibit the railroad's action, and substantial past practice to support it, the railroad's position was, at the very least, "tenable." In such a situation, the court is *required* to conclude that the dispute is "minor" in nature and leave resolution to the Adjustment Board.

But the court of appeals here went further, weighing the evidence on both sides or, as respondents put it, making an "assessment of the entire record" (Br. in Opp. at 11). In weighing the evidence and determining the merits of the dispute, the court usurped the function of the agency designated by Congress to resolve such matters. It also put itself in irreconcilable conflict with other courts of appeals.

This is not the first time that the courts of appeals have clashed over the proper standard for determining whether a railroad labor dispute should be submitted to arbitration. For example, respondents cite (Br. in Opp. at 11) the opinion of a Sixth Circuit panel in *United Transp. Union v. Penn Central Co.*, 443 F.2d 131 (6th Cir.), *cert. denied*, 404 U.S. 938 (1971). There the court held that the substitution of computer printouts announcing crew assignments for the traditional "crew boards" created a "major dispute" over working conditions subject to injunction. Several years later, however, the Court of Appeals for the Seventh Circuit addressed facts that "were in all relevant aspects identical," but reached the opposite result. *United Transp. Union v. Baker*, 499 F.2d 727, 731 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974). It reasoned:

> With all due respect and deference to our brethren in the Sixth Circuit, we think their decision misconceives the function of a federal court in the context of a major-minor dispute inquiry: the task is not to interpret the contract; rather it is to determine whether the contractual defense is frivolous. [cita-

> tions omitted]. The Sixth Circuit . . . [made] no determination . . . on the critical question in a major-minor dispute inquiry—whether the railroad's contractual defense is on its face tenable. [*Id.*]

Thus, the misdirected decision of the court below is symptomatic of continuing confusion among federal courts as to their proper role when asked to intervene in a railroad labor dispute.

Respondents appear to argue that the court below was entitled to disregard the standard utilized by other circuits because this case "involves a rather unique situation" (Br. in Opp. at 17). Apart from the fact that this approach misconceives the proper role of the court of appeals, respondents' theory is based upon a mistaken interpretation of the decisions of this Court. In *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969), there was no claim that the action taken by management—a relocation of the reporting points for outlying crews to a yard more than 35 miles away—had ever been countenanced by past practice. Moreover, the Court expressly recognized that past practice would be relevant in reaching a conclusion as to whether the railroad's proposed action affected the *status quo* under the contract. 396 U.S. at 154.

More importantly, the predicate for the Court's decision in *Shore Line* was that management proposed to change the "actual, objective working conditions" of the represented employees (*id.* at 153). The proposed change would have directly affected their wages and expenses. Similarly, in *Railway Telegraphers v. Chicago & North Western Ry. Co.*, 362 U.S. 330 (1960), cited in Br. in Opp. at 9, this Court concluded that the plan proposed by the railroad "would necessarily [h]ave result[ed] in loss of jobs for some of the . . . members of the petitioner union." *Id.* at 332.

In this case, however, the disputed management initiative would not have affected "the actual, objective work-

ing conditions" of the protesting employees. The initiative involved the rebuilding of 700 miles of newly acquired track, and, as the district court found, the Cotton Belt management engaged in "extensive" efforts to recruit adequate numbers of additional signalmen to do this work, including solicitation of former employees of the Rock Island (Pet'n at A-38 to A-41). Only when these efforts proved unsuccessful did management decide to "contract out" the rehabilitation project (*id.* at A-42 to A-43). Thus, the district court found:

> No employee of the Cotton Belt will be laid off or otherwise adversely affected by the utilization of Serrmi Corporation to perform certain signal work on the Tucumcari line. No signal employees of the Cotton Belt are currently laid off. Even with Serrmi performing this work, additional signalmen are required to complete the 1981 rehabilitation project of the Tucumcari line. [Pet'n at A-45.]

In the face of the district court's uncontested finding, the court of appeals had absolutely no basis for concluding that the railroad's actions involved a change in the "reality" of the "actual working conditions" such that the union was entitled to initiate the cumbersome delaying procedures of section 6 of the Railway Labor Act. *Compare Shore Line*, 396 U.S. at 154. Indeed, this case presents the antithesis of the layoffs that formed the factual predicate for the *Railway Telegraphers* decision.[2]

The issues raised by this case are of great legal and practical importance to the railroad industry. In the absence of definitive guidance from this Court, the fed-

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[2] The decision of the Fifth Circuit in United Indus. Workers, Seafarers Int'l v. Galveston Wharves, 351 F.2d 183 (5th Cir. 1965), cited in the Br. in Opp. at 11, is inapposite for the same reason. The court there concluded that a "major dispute" had arisen because of the catastrophic impact on workers' jobs. *Id.* at 189. Moreover, even in the context of that factual situation, the Fifth Circuit adhered to a legal standard that would have permitted the carrier to submit the issue to arbitration if it were "arguably covered" by the agreement. *Id.* at 188-89.

eral courts are likely to continue to use different standards and reach conflicting results in deciding whether railway labor disputes are to be submitted to arbitration or governed by the bargaining procedures of section 6. The resulting uncertainty encourages unnecessary litigation and strikes disruptive of both railroad operations and the bargaining process.

In addition, the specific conclusions of the court below pose major obstacles to the rehabilitation of the nations' transportation system. It is already apparent that, if the nation's railroads are to remain viable, the decade of the 1980's will be an era of mergers, acquisitions, reorganization and technological change. Many issues are likely to arise that will not be clearly addressed by the terms of collective bargaining agreements. While many such disputes could and should be quickly resolved through arbitration,[3] the decision below suggests that the absence of a provision dealing expressly with such issues will preclude that course.[4] Even the remotest impact on the working conditions of the represented employees arguably will provide a sufficient basis for a union to invoke the deliberately lengthy and cumbersome procedures of section 6. These conditions, which are not faced by businesses elsewhere in the economy, may prevent railroad

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[3] Contrary to respondents' suggestion (Br. in Opp. at 16) that arbitration would have been slower than the lengthy procedures of section 6, Cotton Belt offered to submit the dispute to a specially created public law board that could have rendered a decision within 30 days (Tr. 267).

[4] This interpretation, which has already been adopted by the West system case digests (*see* 665 F.2d 987, 988, headnote 5) is clearly inconsistent with other decisions. *See, e.g.*, Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945), where the Court stated that "minor disputes" could include disputes relating "to an omitted case"—*i.e.*, situations where the intent of the parties, although not expressly stated, is illuminated by past practice. *See also, e.g.*, Baker v. United Transportation Union AFL-CIO, 455 F.2d 149 (3d Cir. 1971), and United Transportation Local No. 31 v. St. Paul Union Depot, 434 F.2d 220 (8th Cir. 1970).

management from responding promptly and efficiently to the severe problems of the nation's railroads.

II. THE COURT OF APPEALS' RELIANCE ON PETITIONER'S SECTION 6 NOTICES WAS IMPROPER AND WILL INHIBIT THE NEGOTIATION PROCESS

In their brief respondents concede that the section 6 proposals made by petitioner were treated by the court of appeals as evidence of a "major dispute" with respect to the agreement (Br. in Opp. at 12-14). Respondents argue, however, that such treatment was "appropriate" (*id.* at 12). Indeed, through their emphasis on the statutory phrase "intended change," respondents appear to suggest that the filing of such a notice is, *ipso facto*, an admission that the employer is seeking a change in working conditions and hence that any unilateral action to effectuate that objective gives rise to a "major" dispute.

This conclusion is premised on a misconstruction of the statutory language.[5] More importantly, the *per se* rule that respondents appear to urge in defense of the decision below has never been adopted by any of the other circuits considering this question. The cases indicate that a party to a railroad collective bargaining agreement may argue in arbitration that a proposed action is permissible under the terms of an existing agreement and concurrently seek through the bargaining process to obtain a clarification of the agreement that will confirm its interpretation. (*See* cases cited in Petition at 16-17.)

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[5] The phrase "intended change" appearing in the second sentence of section 6 refers to an "intended change *in agreements* affecting rates of pay, rules, or working conditions," discussed in the first sentence of section 6 (*see* Pet'n at A-76). The language of the statute does not require that every proposed change in an *agreement* constitute a change in a *working condition*.

Respondents attempt with little success to distinguish two of the authorities cited by petitioner—*Carbone v. Meserve*, 645 F.2d 96, 99 (1st Cir. 1981), *cert. denied*, 50 U.S.L.W. 3248 (U.S. Oct. 6, 1981), and *Delaware & Hudson Ry. Co. v. United Transp. Union*, 461 F.2d 671 (2d Cir. 1972).[6] Moreover, respondents say nothing about the three other courts of appeals decisions cited. For example, in *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers, supra*, the Second Circuit reasoned, "The significance of . . . section 6 notices rests to large [illegible] on what the . . . carrier intended when it [illegible] . . . section 6 notices . . . ." 307 F.2d at 35. In this case, the district court made the following finding of fact with respect to the carrier's intent:

> The intended purpose of this counterproposal was to codify the discretionary right which the Cotton Belt had to employ outside contractors and the actual practice of having used outside contractors in the past. Furthermore, the railroad intended to use this counterproposal as a bargaining device in the negotiations that would arise under the Section 6 notice. [Pet'n at A-43.]

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[6] Respondents argue that the *Carbone* and *Delaware & Hudson Ry.* cases relate to attempts to change the express language of a specific agreement (rather than to attempts to clarify something that is not expressly covered but is illuminated by past practice). The short answer to this argument is that nothing in logic and nothing in the opinions in these cases suggests that this distinction is significant.

Likewise, respondents' arguments that those cases should be ignored because petitioner has not withdrawn its 1981 counterproposal (Br. in Opp. at 14) is equally without substance. Petitioner has not withdrawn that counterproposal because the union has not withdrawn its own 1981 proposal to expand the scope rule. Further, the failure to withdraw a proposal has no logical bearing on the issue here, a fact recognized by the Second Circuit when it found in *Delaware & Hudson Ry.* that "neither the filing nor the withdrawing of the . . . counterproposal" could determine the nature of the dispute. 461 F.2d at 673.

Thus, the district found that the section 6 proposals were intended only to codify an existing right claiming by the railroad.

Since the question of intent is one of fact, the court of appeals was not entitled to overrule the district court's findings unless they were clearly erroneous. *See, e.g., Rutland Railway, supra,* 307 F.2d at 35. Yet the court of appeals proceeded to make its own contrary finding on this issue, apparently based upon the broad assumption that any submission of a section 6 notice must have represented an admission that a major dispute had arisen (Pet'n at A-15).

The approach of the court below not only conflicts with those of other circuits, but also threatens to inhibit the use of the mediation procedures pursuant to section 6. Under respondents' theory, if a carrier seeks clarification of an ambiguous point by issuing a section 6 proposal, that action can be regarded as evidence that the carrier presently lacks the right involved in the proposal. The carrier is likely to conclude that the mere possibility of obtaining a concession through the negotiating process is outweighed by the virtual certainty that a damaging legal inference will be drawn.

This aspect of the decision below is particularly harmful in light of the court's other holding that cases such as this one involve a "major" dispute. Under that holding, when there is no express contractual language authorizing a management initiative, a carrier may find itself blocked by a strike if it fails to invoke section 6. But if the carrier does seek clarifying language under that section, its notice will be viewed as an admission that it lacked any authority for its action under the preexisting contract. In short, the decision below puts the railroad management in an almost untenable position—legally precluded from submitting such disputes to arbitration and practically precluded from resolving them through the negotiation procedure of section 6.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit. Alternatively, since that court clearly failed to apply the correct legal standard and erroneously ignored the findings of fact of the district court, the judgment should be summarily reversed.

Respectfully submitted,

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